S. HRG. 109–366

# HABEAS REFORM: THE STREAMLINED PROCEDURES ACT

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

NOVEMBER 16, 2005

**Serial No. J–109–52**

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
27–148 PDF WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
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# CONTENTS

## STATEMENTS OF COMMITTEE MEMBERS


| | Page |
|---|---|
| Cornyn, Hon. John, a U.S. Senator from the State of Texas, prepared statement | 62 |
| Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin | 27 |
| prepared statement | 83 |
| Kyl, Hon. Jon, a U.S. Senator from the State of Arizona | 18 |
| Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont | 2 |
| prepared statement | 94 |
| Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania | 1 |


## WITNESSES


| | |
|---|---|
| Eisenberg, Ronald, Deputy District Attorney, Philadelphia District Attorney's Office, Philadelphia, Pennsylvania | 5 |
| McKibben, Howard D., Senior United States District Judge for the District of Nevada, and Chairman, Committee on Federal-State Jurisdiction, Judicial Conference of the United States, Reno, Nevada | 13 |
| Waxman, Seth P., former Solicitor General of the United States, and Partner, Wilmer, Cutler, Pickering, Hale and Dorr, Washington, D.C. | 7 |


## QUESTIONS AND ANSWERS


| | |
|---|---|
| Responses of Howard D. McKibben to questions submitted by Senator Leahy | 37 |


## SUBMISSIONS FOR THE RECORD


| | |
|---|---|
| American Bar Association, Eric M. Freedman, Maurice A. Deane Distinguished Professor of Constitutional Law, Hofstra Law School, Washington, D.C., prepared statement | 44 |
| American Judicature Society, Judicature, September-October 2005, Des Moines, Iowa, editorial | 57 |
| Arizona Daily Star, Tucson, Arizona, July 9, 2005, editorial | 58 |
| Concord Monitor, Concord, New Hampshire, July 17, 2005, editorial | 60 |
| Denver Post, Denver Colorado, August 9, 2005, editorial | 63 |
| Detroit Free Press, Detroit, Michigan, July 19, 2005, editorial | 64 |
| Eisenberg, Ronald, Deputy District Attorney, Philadelphia District Attorney's Office, Philadelphia, Pennsylvania, prepared statement | 65 |
| Federal Public and Community Defenders, Thomas W. Hillier, II, Federal Public Defender, Chair, Legislative Expert Panel, letter | 76 |
| Hartford Courant, Hartford, Connecticut, October 25, 2005, editorial | 85 |
| Journal Gazette, Fort Wayne, Indiana, August 2, 2005, editorial | 86 |
| Kansas City Star, Kansas City, Missouri: | |
| July 15, 2005, editorial | 87 |
| October 6, 2005, editorial | 90 |
| Keene Sentinel, Keene, New Hampshire, July 23, 2005, editorial | 91 |
| Knight-Ridder News Wire, Philadelphia, Pennsylvania, July 23, 2005, editorial | 92 |
| Los Angeles Times, Los Angeles, California, July 13, 2005, editorial | 96 |
| McKibben, Howard D., Senior United States District Judge for the District of Nevada, and Chairman, Committee on Federal-State Jurisdiction, Judicial Conference of the United States, Reno, Nevada, prepared statement | 97 |
| New York Times, New York, New York, July 16, 2005, editorial | 113 |
| Philadelphia Inquirer, Philadelphia, Pennsylvania, October 28, 2005, editorial | 114 |

Page

St. Louis Post Dispatch, St. Louis, Missouri, July 13, 2005, editorial ..... 115
St. Petersburg Times, St. Petersburg, Florida:
August 26, 2005, editorial ..... 117
October 31, 2005, editorial ..... 118
San Francisco Chronicle, San Francisco, California, July 14, 2005, editorial .... 119
San Jose Mercury News, San Jose, California, August 19, 2005, editorial ..... 120
Tennessean, Nashville, Tennessee, July 22, 2005, editorial ..... 121
Washington Post, Washington, D.C.:
July 10, 2005, editorial ..... 122
August 19, 2005, editorial ..... 123
September 29, 2005, editorial ..... 124
Waxman, Seth P., former Solicitor General of the United States, and Partner, Wilmer, Cutler, Pickering, Hale and Dorr, Washington, D.C., prepared statement ..... 125

# HABEAS REFORM: THE STREAMLINED PROCEDURES ACT

**WEDNESDAY, NOVEMBER 16, 2005**

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Committee met, pursuant to notice, at 9:44 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Kyl, Cornyn, Leahy, Feinstein, and Feingold.

## OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. The Judiciary Committee will proceed with this hearing on habeas corpus reform. We have been awaiting the arrival of other Committee members, but at this time we will move forward.

This is the second hearing on the legislation introduced by Senator Kyl. It is an effort to balance some very complex considerations on death penalty cases to be sure that the constitutional rights of those convicted are observed with the collateral proceedings in habeas corpus, but at the same time to do what is fair to move ahead the conclusion of these proceedings.

This is an area that I have been very familiar with over the years since my days as district attorney of Philadelphia and litigating many habeas corpus proceedings in the State courts and in the Federal courts. There is an overhang of opposition, I think fairly stated, to put a time limit on these proceedings because of people who are opposed to the death penalty. And I can understand that. It is a complicated subject, and people of good will and good faith are on both sides of the issue.

I think it is important to note that in this legislation, we have expanded the DNA to do what is scientifically possible to exonerate the innocent. I note just the recent statistics released about a reduction in the number of death penalty cases, executions, and I think that is occasioned by public doubts as to the guilt of some who are under the death penalty and the growing concern about the death penalty. But as long as it is on the books and the States are moving ahead to enforce it, we ought to do what is practical to avoid enormous delays.

The scheduling of this hearing has been very difficult because we cannot seem to get all the witnesses together at the same time, and

only this morning I found that we do not have the representatives from the Chief Justices here, and I regret that. But we have the Judicial Conference here and we have former Solicitor General Seth Waxman, who appeared at an earlier hearing and has been very helpful in trying to work out some of the intricacies. And we have an astute representative of the prosecutors here, somebody from the Philadelphia District Attorney's Office. He did not serve at the right time, but he is serving now.

Senator KYL. It gets better all the time.

Chairman SPECTER. And they are getting much better all the time. They relegate need ex-D.A.'s to who knows where.

I had made a commitment to Senator Kyl to try to move this along. He has been very cooperative on the first substitute which my staff prepared under my name and the second substitute. And I think we have gone a long, long way. And Senator Feingold has been appropriately urging a hearing. I have been filibustering, Patrick—

Senator LEAHY. Thank you. I showed up.

Chairman SPECTER [continuing]. To make sure that you were here on time to make your opening statement. I have still got a minute and 15 seconds left. I ordinarily want to take 2 minutes.

But as I was saying, Senator Feingold has been appropriately insistent on these hearings, and that is right. We ought to consider them. I was tempted at one point to move the bill out of Committee and decided not to, to give another hearing and to make every conceivable effort to meet all of the objections and to try to move ahead so that we do not get hung up on some claims which are exhausted and some which are unexhausted in the State court, which has an interminable tennis match, and to do what we could to provide effective assistance of counsel. And the 1996 legislation goes a long way there, but it has not been implemented because it has been so complicated, and we are working on that collaterally in other legislation which is being considered.

I am delighted to yield now to our distinguished Ranking Member, Senator Leahy.

## STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman, and I know your penchant—which I happen to agree with, and what I have followed the various times I have been Chairman—of starting on time and I appreciate your—I know you held up while I tried to get through unbelievable traffic jams. And I am glad you are holding this hearing. It is our second hearing. Since our first hearing back on July 13th, I believe, the bill has been strongly opposed by a wide range of experts and practitioners, and it has twice been rewritten.

Yesterday, the Senate voted to strip Federal courts of the authority to consider habeas petitions from detainees being held in U.S. custody as enemy combatants, demonstrating once again to the rest of the world our great commitment to the rule of law, I guess. At no time before in our Nation's history have habeas rights been permanently cutoff from a group of prisoners. I found it interesting we are doing it at the same time when the President is abroad telling other countries that they must improve their commitment to the

rule of law and to people's rights. And with the support of the White House, we are moving here to cutoff people's rights. It is fascinating double-talk. And we did it without even holding a Committee hearing on issues so fundamental to basic precepts and basic rights under our system of Government.

I am glad to see our witnesses today. I am glad to see my friend Seth Waxman, a former Solicitor General. When we adopted the current version of the bill in October, it was claimed that this version addressed, or at least substantially addressed, all the concerns that Mr. Waxman had raised, and I do not believe that is the case. I will let him speak for himself on it.

This version has a number of problems. The bill seeks to impose radical and unprecedented restrictions on the Great Writ of habeas corpus. I think it injects confusion into settled law. That only increases litigation. It does not decrease it. It would eliminate essential protections against wrongful convictions without making any kind of provisions for claims of innocence.

If it is passed, it would preclude Federal courts from enforcing Federal constitutional rights. Just think about it. It would preclude them. Amazing court-stripping.

The legal community recognizes this. The American Bar Association calls the bill before us "a significant setback for justice." Both the U.S. Judicial Conference and the Conference of Chief Justices, who normally take a pretty conservative attitude on such things, have expressed grave concerns with this bill. They have urged further study and analysis before we start tearing apart the complex edifice that is Federal habeas law. The State Chief Justices cautioned us against passing a bill with "unknown consequences for the State courts." The Judicial Conference reported the vast majority of habeas cases are already moving expeditiously through the system. We will hear more from them this morning.

I know the bill has its defenders. But not one defender of the bill has offered systemic evidence of a real national problem with Federal habeas corpus under the current, post-AEDPA regime. This bill I think is a crude, partisan solution to an unproven and largely non-existent problem, and no amount of tinkering is going to improve that.

If we want to reform the system, improve the quality, efficiency, and finality of criminal justice, there is a different solution. Unlike the SPA, it is a solution that would solve problems in the criminal justice system before they arise, rather than complicating the process of responding to problems via habeas. Unlike the SPA, it is a solution supported by the legal community and the public at large. And it is a solution to which the President and both Houses of Congress have previously committed on a bipartisan basis. It is a promise we made to the American people—a promise we made—and I think we have a duty not to renege on that promise.

I speak, of course, of the Innocence Protection Act. We passed the Act 1 year ago in response to the shameful, widespread evidence of hopelessly underfunded, too often incompetent, and even drunk and sleeping defense counsel in some State capital trials. We did so because we saw only too well the costs of that systemic failure: innocent men on death row, and repeated, fundamental violations of constitutional rights.

The Act established a new grant program to improve the quality of legal representation. This program would greatly reduce the risk of error in those cases. It would reduce the frequency of the most expensive and drawn-out post-conviction proceedings. If we are truly committed to improving the criminal justice system, let's not let Congress's check bounce by failing to fund something that we and the President and the other body all agreed to last year.

We all agree that the trial should be the main event and abuses of habeas corpus should not be tolerated. I was a prosecutor. I believe that very strongly. But let's remember the trial process itself is flawed and it will remain flawed if we continue to skimp on essential funding. And wrongful convictions do occur. As Justice O'Connor has told us, the death penalty system is so flawed in America today we probably already have executed an innocent person. So let's not pass ill-conceived, unnecessary legislation that would only make an unacceptable situation far worse.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Leahy.

Our first witness is—

Senator KYL. Mr. Chairman, might I, as a matter of personal privilege, ask Senator Leahy, if I heard him correctly, that he described my legislation as a "crude, partisan solution." Is that what you said, Senator Leahy?

Senator LEAHY. I believe this legislation is, yes. I believe this legislation is not addressing—especially after we passed the Innocence Protection Act—

Senator KYL. The question is whether you said "crude, partisan solution." If so, I resent that, Mr. Chairman and Senator Leahy. I have tried to work in a bipartisan way. We have taken 6 months now. I have worked with the Chairman. We have tried very hard to do something that responds to a real problem here, and I think that we ought to be discussing this in a sensible, careful, constructive way, and not turn it into some kind of a partisan attack and get into name-calling.

Senator LEAHY. What I said was—let's put it all in context. I said that I know the bill has its defenders, but not one defender of the bill has offered systemic evidence of a real national problem with Federal habeas corpus under the current, post-AEDPA regime, and the bill remains a crude, partisan solution to an unproven, largely non-existent problem, and no amount of tinkering will solve that.

I have a great deal of respect for the Senator from Arizona. We have worked together on a number of issues. My feeling about this bill remains the same.

Chairman SPECTER. Senator Kyl, would you care to respond further?

Senator KYL. Mr. Chairman, I will just note that there are organizations that believe that this is a proper response to a Federal problem. The National District Attorneys' Association at their national convention recently endorsed generally this legislation, and there are others. And I will put a statement in the record, with your approval, that—

Chairman SPECTER. Without objection it will be made a part of the record.

Senator KYL [continuing]. Represents some more recent evidence of this phenomenon than was presented at the first hearing that we held.

Chairman SPECTER. Thank you, Senator Kyl.

We now turn to Deputy District Attorney Ronald Eisenberg of the Philadelphia District Attorney's Office. He is the head of the Law Division, which has responsibility for direct appeals, post-conviction matters, Federal litigation, and legislation. He comes from a very busy office which has hundreds of homicides, 500 during my tenure there some time ago; tens of thousands of cases, 30,000 during my tenure some time ago; and is very experienced, of necessity, in habeas corpus matters.

Mr. Eisenberg, we thank you for coming back again, and to the extent you could focus on the length of time and the time lapses occasioned by the matters being referred to the Federal court and being remanded because of the failure to exhaust State remedies, and another round in the State courts, as to how long that takes, and then back to the district court, in the Eastern District and the Third Circuit, we would be appreciative.

**STATEMENT OF RONALD EISENBERG, DEPUTY DISTRICT ATTORNEY, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA PENNSYLVANIA**

Mr. EISENBERG. Mr. Chairman and members of the Committee, thank you for the opportunity to testify before you today.

I am the supervisor of the Law Division in the Philadelphia District Attorney's Office. We handle now hundreds of Federal habeas corpus petitions each year, although many of those drag on in litigation for several years, and many in crimes that occurred when I first joined the office 24 years ago.

I would like to address some of the challenges that have been raised to the Streamlined Procedures Act. I am aware of the view preliminarily that the Federal habeas corpus review process is not in need of reform, that problems, if any, are localized in jurisdictions like the Ninth Circuit Court of Appeals.

Of course, the Ninth Circuit is quite a large locality and worthy of Congressional attention in and of itself, but it is by no means unique when it comes to the gyrations imposed by current Federal helicopter practice.

My experience has been in the Third Circuit, where we face almost exactly the same issues as my colleagues in States such as Arizona and California. I also serve on the board of a national capital prosecutors organization, and I meet regularly with lawyers from all over the country. We are all fighting the same habeas battles—over procedural default and exhaustion and filing deadlines and certificates of appealability and a dozen other habeas concepts that ought to be straightforwardly resolved but seldom are.

Most habeas questions never reach the Supreme Court, so when circuit court decisions slow down the application of the habeas statute, we are generally stuck with them.

Now, I am aware of the argument against habeas reforms that, to the extent problems exist in the administration of the statute, they are limited to the litigation of capital cases. But that, again, is not my experience. To be sure, capital habeas litigation con-

sumes a hugely disproportionate share of habeas resources, and it is the engine that drives the development of convoluted, circuitous application of the habeas statute. Once these extra-statutory interpretations are developed, however, they cannot be confined to the capital context.

For example, the doctrine of stay and abey, which was developed by the courts to deal with eve-of-execution cases, where the defendant wished to go back to State court and raise new claims without jeopardizing his Federal habeas corpus 1-year filing deadline. The Supreme Court has recently attempted to place some limitation on stay and abey, but now that the procedure exists, it cannot be restricted to capital cases. Any defendant, capital or non-, is free to engage in such stay litigation; and if he is successful, he can put his habeas petition on hold indefinitely while he files yet another appeal in State court. This will usually be at least his third appeal in state court, all the while holding his Federal habeas petition.

Now, of the arguments against habeas reform perhaps the most ironic to me is that we do not need any more because AEDPA has fixed everything. The reasoning is that AEDPA, when it was originally enacted, disrupted settled law and required years for the courts to re-establish the status quo. Now that the statute has been "shaken out," the law is stable again, and habeas litigation will move along rapidly, unless new reform upsets the apple cart.

What matters most, however, is how questions under AEDPA are resolved, not how long it takes to resolve them. Take, for example, the doctrine of equitable tolling. In AEDPA, Congress created a 1-year filing deadline for habeas petitions, with various exceptions spelled out specifically in the statute. The Federal courts then decided that they could create their own exceptions that they call "equitable tolling."

Now, that equitable tolling as a general principle is well settled in the circuits, but it would be fiction to suggest that equitable tolling has, therefore, streamlined habeas corpus review. Just the opposite is true. There is absolutely no certainty in application of what was intended as a clear-cut deadline because at any moment the court might decide to invent a new equitable tolling exception. And, even worse, these new exceptions often require extensive factual inquiry in individual cases. A whole cottage industry of equitable tolling evidentiary hearings has now been born. Thus was the time bar transformed from a limitation on litigation into an invitation to litigate.

AEDPA jurisprudence reveals many similar developments. In additional to stay and abey, proper filing, and equitable tolling issues, as I have discussed, we have seen for example, the growth of inadequacy review to undermine procedural default, the indulgence of excessive litigation on certificates of appealability, and the use of claim-splitting and other means of avoid the statutory deference requirement.

I do not believe that Congress is stuck with these applications of the original habeas reform effort, and further legislation is appropriate.

To take just one glaring example, a case that I have been working on where the crime was committed in 1981, the defendant was named Mumia Abu-Jamal. It is still on habeas review now. Four

years ago, we filed a notice of appeal to the United States Court of Appeals for the Third Circuit. We still do not even have a briefing schedule in that case. We have not been allowed to file briefs, let alone hold arguments, let alone await a decision from the Third Circuit.

Thank you.

[The prepared statement of Mr. Eisenberg appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Eisenberg.

Our next witness is the former Solicitor General of the United States, Seth Waxman, partner at the prestigious firm of Wilmer, Cutler; an extraordinary academic background, summa cum laude at Harvard, a 1977 graduate of the Yale Law School, where he was managing editor—mostly those credentials bring you to the Supreme Court, Mr. Waxman. I don't know why you are here only for this hearing.

[Laughter.]

Chairman SPECTER. Has had numerous awards, they will be made part of the record, perhaps most notable the FBI installed him as a permanent honorary agent a few years back.

I don't know if that disqualifies you from testifying, Mr. Waxman, but on a serious note, thank you for coming in again and thank you for all the work you have been doing as we have been laboring with the first substitute and the second substitute and now this hearing to address all of the issues we can in the most forthright and direct way we can to make sure that constitutional rights are not abrogated.

The floor is yours.

**STATEMENT OF SETH P. WAXMAN, FORMER SOLICITOR GENERAL OF THE UNITED STATES, AND PARTNER, WILMER, CUTLER, PICKERING, HALE AND DORR, WASHINGTON, D.C.**

Mr. WAXMAN. Thank you very much, Mr. Chairman. I am very grateful for the opportunity to come back. I did make a rash offer the last time I was here that I very much wanted to work with Senator Kyl and with you, Mr. Chairman, and the members of the staff and to get at the data and ascertain the extent to which there are problems in the system that AEDPA did not correct or, as I believe may be the case, there are problems in the system that AEDPA has introduced. And I believe I offered to charge you the same rate that I was charging for my testimony last time, and I have faithfully continued that pro bono representation. And I am very, very honored to be able to do it. I have met with Senator Kyl's staff. I have met with your staff. I have met with Senator Leahy's staff.

There is nothing more important that I am involved in doing than what this Committee is all about right now. I am reminded, 2 weeks ago I went to see that wonderful movie that is out about Edward Murrow, "Good Night, and Good Luck," about the bravery of Mr. Murrow during the regrettable period of the McCarthy hearings. And what struck me most about the film was the very last scene—I hope I do not have this wrong—where President Eisenhower is speaking, and he says what is important about this coun-

try, what is wonderful about this is that we have the writ of helicopter, and the writ of helicopter is there as a historic safeguard.

And I thought immediately to the hearing that this Committee had and the work that I have been doing, and it is why I am looking forward to testifying and answering questions this morning.

I will spare the previous introduction. I am not a philosophical opponent of the death penalty. I have recommended seeking the death penalty dozens of times. I have less patience with delays than anybody that I know, and I am fully in favor of expedited proceedings in my professional life and in my personal life.

I think that the substitute bill that we are looking at now does eliminate some of the problems that I identified in my last testimony. I still think that there are provisions of this law that are very problematic. I don't think in 2 minutes and 30 seconds in my opening statement I will be able to address them, but perhaps I can explicate them.

I am most concerned about—

Chairman SPECTER. Mr. Waxman, take the time you need. We will give you extra time.

Mr. WAXMAN. I appreciate it. I am most concerned about Sections 2, 3, 4, 5, 8, and 10. But my overriding concern with this is I think that this legislation in very large part represents a good-faith effort to address problems that have not been documented to exist in any systematic way, and based on my experience and looking at the data that I have looked at, do not, in fact, exist in any serious way.

And I wouldn't be as troubled by that alone as I am by the fact that I know that, if enacted, these provisions will deny relief and, indeed, will deny access to the courts to people whose fundamental constitutional rights have been violated, some of whom are actually innocent.

Now, I will be talking a little bit about innocence in the course of my remarks because it is a prominent feature in a number of these provisions. Let me just turn first to Section 4 of the bill, which deals with procedural default.

Procedural default is a doctrine that provides that even if there is a constitutional violation, if there was an adequate and independent State ground for the court to rule, that is sufficient, and Federal habeas corpus courts in an exercise of federalism don't have the authority to second-guess what the highest court of the State has said on an adequate State ground justifies the detention.

There was a doctrine in place for many, many years called "the deliberate bypass doctrine" that basically precluded people, prisoners, from coming to Federal court if they had deliberately bypassed their remedies in State court. In 1979, I think it was, the Supreme Court in a landmark decision issued by Chief Justice/then Justice Rehnquist, *Wainwright* v. *Sykes*, established a very, very high bar to overcome a procedural default—that is, an instance in which an adequate and independent State ground had not been availed. And that is the so-called cause and prejudice test. The cause and prejudice test of *Wainwright* v. *Sykes* is one of the most settled doctrines in the law, and recognize that in habeas corpus law there is almost nothing that is settled. It is the most esoteric—it has become the most esoteric area of the law in existence.

The cause and prejudice standard, though, is a notable exception. It is settled. It is very stringent, and it only allows the most extreme cases through. In my testimony, my written testimony, I give the example of *Strickler* v. *Greene*, a Supreme Court decision a few years ago where the Supreme Court found cause—that is, there had been an egregious—there had been a very good reason for the failure to bring to the State courts a meritorious constitutional claim, but because the Supreme Court wasn't satisfied beyond any reasonable—to a reasonable degree that the constitutional error would have changed the death sentence, defendant's sentence, it denied relief. It wasn't enough under cause and prejudice to show that there was a constitutional violation, and there was very good cause not to have brought it to the attention of the State courts. But, nonetheless, he was denied relief and executed.

Now, Section 4—I should say also that the cause and prejudice standard was so settled and, in my opinion, so satisfactory to both the community of prosecutors and, I suppose, the courts, that it wasn't even considered in the context of amending AEDPA that any change be made in the procedural defaults rules. There wasn't a procedural default provision in AEDPA because, in my experience, the procedural default standard under *Wainwright* v. *Sykes* is so stringent that there aren't any systematic abuses.

Now, Section 4 of this bill does alter the cause and prejudice standard. It denies Federal courts, strips Federal courts of jurisdiction of any case in which a State court, rightly or wrongly, post hoc or otherwise, says that there was a rule of procedure that was not complied with, except in an instance in which you can demonstrate not just cause and not just that the substance of your claim is not only correct but, if denied, would constitute an unreasonable application of settled Supreme Court precedent, but also that you can prove on a going-in basis that you had no involvement in the crime at all, not simply that you are legally innocent of the crime of which you were convicted, not simply that you are legally innocent of any other activity in connection with the crime, but that a court, but for the error, would have found that you did not participate in any way in the underlying offense.

Now, let me address first whether there should be a safeguard for the rare case in which there is an excusable procedural default. The last time I was here, I discussed with the Committee the case of *Lee* v. *Kemna*. It is described at length in my written testimony. The court asked all of the other members of the panel with whom I was sitting whether in writing they could dispute that the Supreme Court had, in fact, decided what I decided. And I do not believe that anybody did dispute it. But that was a case in which in the middle of a trial in which the witnesses were sequestered, when the defense lawyer in the middle of the day came to call his witnesses, he discovered that somebody—likely, the court held, a court official—told his witnesses, who had come all the way from California to, I think, Missouri, that they would not be called that day and they could go home. He then asked for a continuance until the next day so that he could obtain his subpoenaed witnesses. The court denied it because the court had other pressing matters.

He took an appeal, and on appeal, the court of appeals said, well, that may not have been a sufficient reason, but there is a rule in

this State that all motions be in writing, and his motion to continue the trial because his witnesses had gone home was not in writing, and that is an adequate and independent State ground. And a substantial majority of the Supreme Court said that that rule, which was applied not at the request of the prosecution at trial and not by the trial judge at the time, but by the court of appeals after the fact, cannot eliminate the ability to get relief in Federal court.

Similarly, another Supreme Court case, *Ford* v. *Georgia*, the rule that was allegedly defaulted was announced after the alleged default took place. *Amadeo* v. *Zant*, which I also discussed in my written testimony, a case in which there was deliberate, despicable misconduct by the State prosecutor with respect to the jury pool that was concealed, that was not revealed until discovery many years later in Federal court, there was a procedural default in that case because the claim was not raised in State court because it had been concealed. I do not believe that it is consistent with the Writ to strip Federal courts of jurisdiction to consider cases like that. And I particularly think that it is inadvisable in the absence of any demonstration that there really is a systemic problem with the cause and prejudice standard.

Now, the innocence prong of this, the innocence exception that this substitute legislation includes, as I said, requires that you show up front not only that you have a claim so meritorious that denying it would be unreasonable in light of settled Supreme Court precedent and that you had sufficient cause not to have brought it to—not to have complied with the State rule, but that you had no involvement in the underlying offense. And I want to just spend a minute to express my understanding of what exactly that means.

First of all, it means that there would be no sentencing errors at all ever considered by a Federal court in the context of one of these procedural defaults, whatever caused it, and that is because if the constitutional error related to the sentence, that, ipso facto, deprives you of the ability to show that you had no involvement whatsoever in the underlying offense.

Now, it may well be that we as a society have little sympathy for claims about whether a sentence was too long or not too long, or too long because of constitutional error. But a fundamental premise of our capital punishment system is that not everybody who is guilty of a crime deserves to be executed. We have a whole edifice that the Supreme Court has said the Constitution requires to separate out among those premeditated murderers those who are, as the court has said, "the worst of the worst." And yet there would be no sentencing claims allowed under Section 4 because you need as a threshold matter to prove that you had no involvement in the conduct that formed the basis of the crime.

A good example would be, let's say, the prosecution seeks the death penalty against somebody under *Edmonds* v. *Florida* because they were the trigger man of a cold-blooded murderer. And *Edmonds* says that if you are actually the trigger man, you can get the death penalty.

Well, let's assume that there is egregious *Brady* violation that is discovered, as was the case in *Banks* v. *Dretke*, decided by the Supreme Court 2 years ago, in Federal court because the evidence

had been concealed by the prosecutor in State court, which did not order discovery. So you come to Federal court, you are in Federal court, and you say, look, there is irrefutable evidence that was in the prosecutor's file that I did not pull the trigger, but you cannot prove that, consistent with principles of felony murder, that you either were not there or out in the getaway car or something like that, you cannot get that—you cannot get in the door. The Federal court does not have jurisdiction to consider that claim.

Now, let's look at guilt/innocence, which is, you know, after all, the main event here. Innocence claims do not arrive in Federal court as fully formed claims of actual innocence. What happens is that the fear here is and what habeas corpus protects is instances in which there is something fundamentally unfair, not just somewhat unfair but constitutionally unfair in the procedures that took place. There are instances, there are many instances in which as a result of those fundamentally unfair procedures, innocent people are convicted even though they do not have fully formed proof of their innocence at the outset.

There are many, many instances in which in Federal habeas corpus and in State habeas corpus prisoners prevail on claims of fundamental constitutional violations and are thereafter, when the violation is corrected, acquitted or exonerated. There was a report in yesterday's newspaper about a case in Philadelphia in which this happened. But looking at reported cases, *Kyles* v. *Whitley*, which I mentioned in my testimony, there was—in Federal court it was discovered that there was an egregious Brady violation with respect to the testimony of the prosecution's main witness. The writ was granted. He was retried. Three times the prosecution failed to obtain a conviction when—

Chairman SPECTER. Mr. Waxman, how much longer do you think?

Mr. WAXMAN. I can be shut off at any time, Mr. Chairman.

Chairman SPECTER. No, I do not want to. I think what you said is very informative, and you are still on Section 4.

[Laughter.]

Mr. WAXMAN. I want to go back to Section 2 and 3.

Chairman SPECTER. Well, I think you made a pretty good case as to Section 4, and I would urge you to move to a new section. But you spent a lot of time with staff and you have a lot to say, and I think we want to hear it.

Senator LEAHY. Mr. Chairman?

Chairman SPECTER. But we want to get some idea as to how long it will take.

Senator LEAHY. Mr. Chairman, I just wonder, if I might, as I am listening to this, I reread my statement, and I think the Senator from Arizona makes a good point. This is probably going to ruin his reputation back home if he finds out that I might agree with him on something. I would change my sentence to read—and ask consent to change it in the statement so that the statement reads, "This bill remains a solution to an unproven and largely non-existent problem, and no amount of tinkering would solve that"—which is my feeling. I would strike the words "crude and partisan." The Senator from Arizona is correct.

Senator KYL. I appreciate it.

Chairman SPECTER. Thank you for that, Senator Leahy.

Mr. WAXMAN. Mr. Chairman, I will just take a few minutes on each of the remaining sections, and I invite questions. I am really only here to answer the Committee's questions, not to make a stump speech, and I realize that—

Chairman SPECTER. It is not a stump speech. It is very profound, and you are obviously very knowledgeable, and it is very helpful.

Senator LEAHY. Trust me, we know stump speeches up here.

[Laughter.]

Mr. WAXMAN. My daughter was very fond of saying, before she went off to be an undergraduate at the University of Pennsylvania, her stump speech was that there is nothing more dangerous in this country than her father in front of a microphone without a red light.

[Laughter.]

Mr. WAXMAN. Which is what they have in the Supreme Court that tells you to stop. I was, you know, very respectful of the timer in front of me until the Chair gave me permission that he probably did not realize would have such a dramatic effect. But let me just trip through my objections on—my concerns about the other provisions.

Chairman SPECTER. Go ahead.

Mr. WAXMAN. And then solicit questions.

Much of what I had to say about Section 4 on procedural default is also the case for Section 2 on exhaustion of mixed petitions. In my written testimony, I went through how the exhaustion doctrine is one of timing and not one of extinction or not one of preclusion, but this exhaustion remedy does change that.

In a perfect world, all constitutional claims would be raised in State courts before they go to Federal court. That is the comity rule that the exhaustion doctrine respects. And in very large part, the existing doctrines with respect to requirements for exhaustion and the requirement that mixed petitions be dismissed has enforced that rule, but we do not live in a perfect world. We have to have a failsafe for those instances in which there is a darn good reason why there has not previously been exhaustion.

We have a world in which many, many, many, many, many prisoners appear pro se. Many of them who do not appear pro se have lawyers that can only be charitably called incompetent. We have instances—Brian Stevenson was here last time talking about instances in which State courts on post-conviction have refused to rule for years and decades. And we have instances, regrettable but documented, in which an errant prosecutor will stonewall legitimate discovery requests, the State court will not order it, and like in *Banks* v. *Dretke*, the information only comes out in Federal court.

And there are plenty of instances—Mr. Eisenberg talked about stay and abey and how it is abused. Well, first of all, the Supreme Court just decided a case this year, *Rhines* v. *Weber*, that puts very stringent restrictions on the ability to go back and exhaust unexhausted claims. And we have not seen—there is no reason to think that that will not solve whatever problem exists. But more to the point, there are many instances in which it is the State, not the defense, that in the instance of an unexhausted claim, with

good cause, the State refuses to waive and insists that the prisoner go back into State court and exhaust. And in Pennsylvania itself, the case of *Aaron Jones*, which Mr. Dolgenos testified about last week at the House Judiciary Committee hearing, and the *Brinson* case, which I can discuss in detail and I am sure Mr. Eisenberg is familiar with, are instances in which, in one case a *Brady* violation, in another a *Batson* violation, came to light while in Federal court. The defense in the *Jones* case by defense counsel and in the *Brinson* case by a pro se prisoner implored the prosecution and the Federal court not to send them back to what the prisoner in *Brinson* called "the morass" of the State post-conviction proceedings, but just address the merits. And in both instances, it was the prosecution that insisted on stay and abey so that there would be exhaustion.

But, in short, I don't think that there is, particularly in light of *Rhines* v. *Weber*, a significant problem or a problem of any dimensions at all with abuse of the existing law on the exhaustion requirement on mixed petitions, and all of the things that I said about the no-involvement standard of innocence, proof requirement up front, also apply here.

Chairman SPECTER. Mr. Waxman, are the other sections covered in your written statement?

Mr. WAXMAN. Yes, they are.

Chairman SPECTER. I think we will move on then. Thank you very much for that.

[The prepared statement of Mr. Waxman appears as a submission for the record.]

Chairman SPECTER. We are going to come back to you, Mr. Eisenberg, before questions to give you a chance to offer any comments or rebuttal to what Mr. Waxman has said.

Our next witness is Judge Howard McKibben from the District of Nevada, appointed to the Federal bench in 1984, had served on the State court for 7 years before that, was a district attorney, a very outstanding academic record.

Thank you very much for joining us, Judge McKibben, to testify on behalf of the Judicial Conference.

**STATEMENT OF HOWARD D. MCKIBBEN, SENIOR UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEVADA, AND CHAIRMAN, COMMITTEE ON FEDERAL-STATE JURISDICTION, JUDICIAL CONFERENCE OF THE UNITED STATES, RENO, NEVADA**

Judge MCKIBBEN. Thank you very much, Mr. Chairman, Senator Leahy, and members of the Judiciary Committee. It is always a little daunting to go after someone like Seth Waxman. I must say, in court I am always delighted to have attorneys like Mr. Waxman appear. It makes the judge's job a lot easier when they can articulate issues as clearly and concisely as he does, and so I am delighted to join this panel.

I will make my remarks brief, and I would ask that a copy, Mr. Chairman, of my remarks be made a part of the record.

The Judicial Conference Committee on Federal-State Jurisdiction, which I chair, is one of the few committees of the Judicial Conference that includes State court judges as members. We have

four chief justices of the supreme courts on our committee, and they have provided substantial input in connection with the issues that have been raised in the bill that is before you.

Our Committee serves as a conduit for communication of matters of mutual concern between the Federal and State courts, and I have a special affinity for State courts, having formerly been a State trial judge and a State prosecutor.

Let me say to the members of the Committee, the judiciary hears your concerns about delay in processing some habeas cases in the Federal courts. We support the elimination of any unwarranted delays in the fair resolution of habeas cases by State prisoners in the Federal courts. And, Senator Kyl, I know that you have provided the Committee with information that shows that some cases, capital cases, have been pending in the Federal courts for a significant period of time. Our preliminary statistical data—and we have requested that—does not appear to show a significant delay in the processing of non-capital cases. The information with respect to capital cases is, at this point, what I would call inconclusive and does, in fact, suggest the need for further analysis.

As you know, the Judicial Conference has urged in previous communications to this Committee that a careful analysis be undertaken to determine if, in fact, there is any unwarranted delay and, if so, the causes of such delay before Congress further amends the habeas corpus statute. And I would indicate that it is very difficult—having handled capital cases and non-capital cases over the years I have been on the Federal bench—it is very difficult to take the statistics and look at them and say it took X number of months or X number of years to resolve this case and know what actually happened in the case as to whether or not what, in fact, happened was reasonable. Was it a reasonable period of time? Were there reasons for the delay and the ultimate disposition of the case? And that requires a fairly systematic review of those cases to make that determination.

Second, the Judicial Conference opposes provisions in the Streamlined Procedures Act that would shift from the Federal courts to the Attorney General the decision for determining whether a State has met the requirements to opt in to the provisions of Chapter 154, those provisions that would impose specific time deadlines on the courts of appeals for deciding habeas petitions, those provisions that would change the procedures by which the Federal courts consider applications for expert services, and those provisions that would apply the provisions of AEDPA and the Streamlined Procedures Act retroactively.

Third, with respect to limiting Federal court review of habeas claims, in September of this year, as you will recall, the Conference expressed its opposition to certain provisions of S. 1088, as adopted by the Senate Judiciary Committee in July, that have the potential to undermine the traditional role of the Federal courts to hear and decide constitutional claims, with appropriate deference to State court proceedings, and to prevent the Federal courts from reaching the merits of habeas corpus petitions by adding procedural requirements that would complicate the resolution of those cases and, in the opinion of the Conference, lead to protracted litigation.

We recognize that this Committee has continued to make changes in the legislation through the adoption of a second substitute amendment in October. We are, however, concerned that the legislation may still limit Federal court review of meritorious constitutional claims inappropriately.

Fourth, the October substitute recasts the cause and prejudice standard defined and developed by the Supreme Court—and as Mr. Waxman has eloquently indicated to you, that is an extremely well-settled doctrine in our jurisprudence, which we rely on all the time. And that has been in existence, I think for about 27 years, 28 years. And it recasts the cause and prejudice standard in mixed petitions, procedurally defaulted claims, and amendments to claims in a manner that we have not seen before. These revised standards have never before applied in this manner. They create complexity and could further delay, not expedite, the resolution of Federal claims. And I think that is an important point. Complying with such standards may be even more problematic in cases where the applicant did not have counsel in the State post-conviction proceeding.

Now, the October substitute would redefine prejudice, as we understand it, as a "reasonable probability" that, but for the alleged error, the fact finder would not have found that the applicant "participated in the underlying offense." The reference to the underlying offense changes the focus of the traditional role of habeas from whether an error infected the entire trial, with error of constitutional dimension—and not every error clearly would be cognizable, but those that infect the entire trial with error of constitutional dimension are—to whether the error would cast doubt on the claimant's participation in the underlying offense; not just if the individual is guilty of the underlying offense. Constitutional errors that affect whether a person should be sentenced to death may not be reviewable under such a standard because such errors may have no bearing whatsoever on whether the applicant participated in the underlying offense.

There is a similar concern with the modification of the actual innocence standard. As with the revised cause and prejudice standard, this provision could foreclose review of sentencing errors, and it appears that it would and, thus, is inconsistent with Conference policy.

Fifth, the October substitute takes the restrictive standards of Section 2254(e)(2) and for the first time, as we understand it, uses them to limit a person's access to Federal court review of unexhausted and procedurally defaulted claims and amendments to petitions in capital cases under Chapter 154.

And, finally, AEDPA already sets a very high bar when Federal courts consider claims that a habeas petitioner failed to raise in State court, and, as such, appropriately recognizes the deference that Federal courts should give to State court proceedings. In just the past 3 years, the Supreme Court has considered over 19 cases addressing issues raised by the passage of AEDPA, and that is a very large number of cases for the Supreme Court to consider and decide. Nine of those decisions were handed down this past year. Only now is the law becoming somewhat settled with respect to AEDPA. If Congress substantially revises the procedures in habeas

corpus cases, there is a concern that it most certainly would invite a new round of litigation on statutory and constitutional issues, complicating and protracting, not expediting, we believe, the consideration of habeas petitions in Federal courts.

In closing, Mr. Chairman, I thank you for the invitation to address the Committee. I know that the members of the Committee and the judiciary share a common goal to preserve and protect the fundamental fairness and integrity of our criminal justice system. I thank you very much for your time.

[The prepared statement of Judge McKibben appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Judge McKibben.

Mr. Eisenberg, would you care to offer some additional comments at this time in response to what either Mr. Waxman or Judge McKibben said.

Mr. EISENBERG. Thank you, Mr. Chairman. Just a couple of points, if I may.

The argument is made that the existing cause and prejudice standard for procedural default is so settled and so satisfactory that Congress did not even consider a need to address the issue when it passed AEDPA. And it is true that AEDPA does not address that issue.

The problem is what has happened since AEDPA. Since AEDPA tightened up on other aspects of habeas review, cause and prejudice and procedural default has been used as a means of essentially circumventing those limitations.

Now, as to the cause and prejudice standard itself, our problem is that we cannot even get to it in some many cases because the doctrines in habeas corpus allow the Federal court first to decide under the label of "adequate and independent" whether the State court rule should be given any effect at all in Federal court. And unless and until you pass that threshold, the court in Federal habeas review does not even have to consider cause and prejudice. So that is our initial roadblock and one of the main things that the current legislation addresses, is the power of the Federal court to simply throw out the State procedural rule without any reference to cause and prejudice, to simply say it does not count. And when the court says that, it is not just for that case. It is for all cases to which that rule might apply.

We have in Pennsylvania, for example, enacted a post-conviction review statute that had some similar provisions to the AEDPA. We did it around the same time, guided in part by the provisions in AEDPA, and we imposed a 1-year deadline for filing State post-conviction petitions. We made it clear at the beginning of the statute that it applied to all cases, capital and non-capital cases.

The Third Circuit has held that that statute was not an adequate ground for finding petitions filed more than a year to be untimely, and the reason it was not is because the statute did not specifically—the courts had not yet said whether that statute really meant what it said or whether the courts might create exceptions to the statute along the lines of some of their previous court-made doctrine.

So even a statute whose words were not in any way in dispute, whose words were clear on their face—there was no dispute from

the Federal court about the clarity of the language or the consistency of the application, once the issue reached the State courts, even that statute was not considered to be an adequate ground for a default because the Federal court said, well, there was all this time before the State courts first started interpreting it, and, yes, once they did, they applied it exactly as it was written, and they have consistently done so ever since; but, hey, how were we supposed to know what they would do until they addressed it?

And so no procedural default there for an entire class of cases. All capital cases for several years—we do not know how many yet—for several years after the statute was passed, which were defaulted in State court because they were found untimely, are now being allowed review in Federal court, which will mean complete review, no deference standard to the decisions in State court because the State courts did not reach the merits. They applied their statute and found those cases time-barred. The Federal court is now going to get to review those cases despite the default.

Now, when we get there and they apply that default, of course, it is going to apply to all sorts of claims. The argument has been made that the new statute will limit cause and prejudice to prejudice going to the underlying offense. Well, that is the argument that we keep hearing about the need for expansive Federal habeas corpus review, that we have to protect innocence. And, clearly, this standard does so.

But let's keep in mind when it comes to considering limitations to the cause and prejudice standard and the innocence provision of those exceptions that we are talking about cases that were supposed to be defaulted to begin with. We are not saying that you cannot raise constitutional violations in Federal court. We are saying you have to follow the rules to do so. And the question in this area is the breadth of the exceptions that we will make if you do not follow the rules.

The argument essentially is being made that we cannot limit those exceptions, that even if you default your claims in State court, even if you try to get into Federal court through one of these exceptions, you should have essentially as broad review as if you had not defaulted your claim in State court. And that is not going to ensure any sort of compliance with the procedural rules that the habeas corpus statute establishes and that the courts have been developing for decades, even before AEDPA was passed.

There have to be narrower standards for the consideration of claims that are not really properly before the Federal court at all than for those claims that are in order to hope for any sort of compliance by the petitioner in State court with the rules that we are entitled to apply. The Federal courts have their procedural rules, we have our procedural rules, and they are entitled to deference in Federal court as well. And I think that that is what the case law and what this legislation tried to establish.

Let me speak very quickly to the *Rhines* point because I think that is a significant one, the recent case concerning stay and abey.

The Supreme Court, because it is a court and not a legislature, established in *Rhines* exactly the kind of amorphous judicial standard that invites rather than limits further litigation. The lower courts are now going to have to go back and look at what *Rhines*

said and they are going to have to decide, well, what is good cause in a particular case, what are the underlying merits of the claim, and a whole body of case law will be developed, and even once it is developed, there will still be litigation about the application of those amorphous standards to the facts of individual cases. That is exactly the kind of problem that we are talking about, is the existence of these kinds of generalized standards that require years, add on years to the process of litigating these claims.

I would like to look in that respect at the bottom line with reference to the statistics that Judge McKibben mentioned from the Administrative Office of United States Courts. He referred to statistics that I believe are mentioned on pages 2 and 3 of the attachment to the letter that was filed with the Committee by the Judicial Conference in September of this year, and those statistics shows that over the last 6 years, the time to dispose of a capital case on Federal habeas corpus review has increased—increased—by 50 percent just over the last 6 years, and it has nearly doubled in the district courts. The time from filing to disposition in the district courts went from 13 months in 1998 to 25.3 months in 2004, and the time from filing of the notice of appeal to disposition of a capital appeal in the Federal courts of appeal went from 10 months in 1998 to 15 months in the year 2004.

Now, I cannot vouch for the accuracy of those statistics, but I can certainly tell you that they are consistent with my experience and with the experience of my colleagues and that they show that the problem is not getting better as the result of AEDPA, as Congress intended. It is getting worse.

The statistics also refer to delays in non-capital cases, and the point is made that according to those statistics, the disposition rates for non-capital cases have not increased in the way that they have for capital cases. What those statistics also show, however, is that the disposition rates for non-capital cases have not decreased despite AEDPA, despite the reforms that Congress put in place 10 years ago, there has been no movement, even in the disposition rates for non-capital cases.

Now, AEDPA was supposed to help speed things up. Significant new provisions like the time bar, if fairly applied I think, should have reduced disposition times even for non-capital cases—

Chairman SPECTER. Mr. Eisenberg, how much more time do you think you need on this round?

Mr. EISENBERG. Thank you for the opportunity, your honor, and that would be my last sentence. That times are increasing for capital cases, not decreasing for non-capital cases.

Chairman SPECTER. Thank you very much. I am going to yield my opening round of questions. Senators have 5 minutes to question. I am going to yield my opening round of questions to Judge Kyl, and then we will come to Judge Leahy for 5 minutes, and then we will go back to Judge Kyl for five minutes.

[Laughter.]

Senator Kyl.

**STATEMENT OF HON. JON KYL A U.S. SENATOR FROM THE STATE OF ARIZONA**

Senator KYL. Thank you, Mr. Chairman. I am still enough—

Chairman SPECTER. I am just trying to promote you a little.

Senator KYL. Yes, and I appreciate that. I am still enough in awe of judges, I begin by, "May it please the Court."

I want to begin by saying thank you, Mr. Chairman, for holding this hearing and for all of your cooperation and your staff's significant cooperation as well. They have spent hundreds of hours on this.

To all three witnesses, very much appreciate your being here, and particularly, Mr. Waxman, with I suspect what you charge per hour. I was moved by your point at the beginning of your testimony that this is important work and you are willing to devote your abilities to this work. I appreciate that very much. For somebody like Mr. Eisenberg on the front lines of this battle to relate to us the kind of experience that you have I think is very, very important to our deliberations.

Obviously, we have started a great debate here and I think it is a debate worth having. I think the fact that the debate has occurred has made the legislation better. I still think we have a problem to address, and in the relatively brief period of time that I have, I would like to begin with that, but preliminarily to make this general observation. It seems to me that what we have started here is a debate about those on one side who are really reluctant in any way to reduce the potential impact of a habeas petition on the one hand, and those on the other hand, Mr. Eisenberg, represented by what you characterized as your bottom line here, which is that because of the delays and the difficulties in dealing with all of these habeas positions, there has to be a difference between those cases in which the procedural rules in the State courts have been complied with and those that have not, and if that is the intent of our legislation here, to draw that distinction and try to speed that process. We had tried to do it in AEDPA, and I think the point is that with respect to capital cases at least the situation has gotten a lot worse. That is really what I would like to begin with and then ask for your comments.

We have adduced evidence in previous hearings and in written submissions that relate nationally, but I just wanted to have you consider what the Arizona Attorney General's Office came up with since our last hearing. These are primarily capital case statistics, so they relate to our most serious issues.

The Arizona study examined the appeals of all of the prisoners currently on death row, over 100. There are 76 capital cases pending in Federal Court, which represents over two-thirds of Arizona's pending capital cases. And although some were filed recently, over half of the cases have been pending in Federal Court 5 years or more. This is in Federal Court now. Of those, 13 cases have been pending for 7 years; 10 cases have been pending for 8 years; five cases have been pending for more than 15 years. I suspect that all of you would agree that that is far too long, that that suggests that something has to be done, not only for the citizens who have to pay for all of this, and the judges whose time it takes up, the prosecutors who are dealing with it, but also the victims.

The study of the Arizona Attorney General's Office further found that only one of the 63 Arizona death penalty cases filed under the

AEDPA standards has moved from Federal District Court to the Ninth Circuit, only one. That case has been in the Ninth Circuit for over 5 years. 28 of Arizona's capital cases have been pending in District Court for between six and 8 years. One of the Arizona death penalty cases has been on Federal habeas review for over 19 years. There is no justification for that. Two of the cases for over 18 years, one for over 16, one for over 14, another for over 12. Clearly there is a problem, so I think we have to decide how are we going to try to address the problem.

Now, AEDPA tried to set up a method by which States, if they provide a lot of resources and good counsel, could presumably get around one of the issues which was the lack of good counsel, and therefore, could be held to a higher standard, and to compliance with State procedural rules. I would appreciate your views as to whether that general approach is generally a good approach? Is that an approach worth working on?

Mr. Waxman, in that context, I think you may have misspoken slightly. You said that AEDPA did not seek to change *Wainwright* because it is so subtle, but in fact, Section 154 does adopt a more stringent test, does it not? In other words, that is what we are trying to get at, is if you really provide good counsel and other resources, then we are entitled to provide some limitations, some speedier access to the courts.

I will just ask all of you to comment on what I have said here since I am done with this first 5-minute presentation. Please, all of you take a crack at what I have just said, which will enable you to also talk about anything else you probably wanted to talk about, starting, Judge McKibben, with you, and then Mr. Waxman and Mr. Eisenberg.

Judge MCKIBBEN. Thank you, Senator Kyl. I appreciate the concern that you have expressed about the cases in Arizona. I know that there are cases in other districts where they have been on the dockets for a substantial period of time. This bill, as I understand it, addresses all habeas, capital and non-capital cases. As I indicated earlier—and the Conferences looked at this—there is no indication in the non-capital cases that there is any significant delay. I have heard Mr. Eisenberg refer to the fact that there should be a decrease, perhaps since AEDPA, in the time on non-capital cases for disposition, but an average 6-month turnaround time on non-capital cases is about as short a time as you are going to have in the Federal Court from the time of a filing. If the case is one where counsel will be assigned, to have the State come in, usually with some continuances and request an additional period of time to file a response, and for the Court then, if there is any discovery—normally you would not have discovery—but if there is some discovery, to dispose of a case like that on average in 6 months is even a faster disposition of the case than you would have in virtually all of your other civil cases.

So it does not appear, when we look at the statistics, that there is any problem with respect to the timely disposition of cases when they are non-capital cases. And yet this bill applies to the non-capital cases too and sets some very severe restrictions on how a non-capital defendant is able to secure any relief, even in the sentencing area. Certainly if there are substantial problems in the

trial process or selection of juries, then not being able to enter the Federal Court unless you meet this very high standard of showing that the factfinder would not have found the defendant participated in the underlying offense is a significant problem.

Putting that aside and addressing the capital cases, the preliminary data that we have suggests, at least in some districts in the country, that there should be a systematic analysis of what caused delay. You cited one case that lasted for around 18 years without being disposed of. I do not know what the facts or circumstances of that case are. It would have to be analyzed. I know there are cases where people have been determined to be incompetent. That case remains on the court docket. It is not a closed file until there is ultimately a disposition, and you would not have a disposition if the individual is incompetent. I have no way of knowing if that is that particular case, but there are reasons why cases can remain on the docket a relatively long period of time. The Conference is recommending—and I think it is a prudent recommendation—that there be a study to determine whether there are systemic problems in our system or if there are some isolated cases which require better case management by the judge that handles the case.

That basically, Senator Kyl, would be my response to the question. Until that study is undertaken and the facts are determined on an individual basis in those cases—and I think we can isolate those cases, whether they amount to 100 cases throughout the country or whatever, and closely analyze them and see the reasons for the delays—we can't draw any conclusions. Many of those delays are as a result of the case going back to State court for exhaustion.

Senator KYL. Mr. Chairman, since I have the next round, and I do want you to go ahead and run the clock and so on so I do not take too much time, but could I do a quick followup just on that last point?

Chairman SPECTER. Certainly.

Senator KYL. Our bill sets only two limits. One is a 300-day limit on issuing Court of Appeals opinion after briefing is done, and then a 90-day period to rule on a petition for rehearing in the Court of Appeals. Are those periods unreasonable in your view?

Judge MCKIBBEN. The Conference has consistently taken a position that time limits should not be established.

Senator KYL. So no time limit would be reasonable then.

Judge MCKIBBEN. I would not say that no time limit is reasonable. In the statute you already have provisions for expeditious consideration of habeas cases, and the court obviously considers those to be important cases.

Senator KYL. Thanks.

Mr. Waxman.

Mr. WAXMAN. Thank you very much, Senator Kyl.

I have never seen, or for that matter heard of the Arizona study. The statistics you cited were quite interesting, and on their face quite perplexing and troubling. For me the question that I really have is, why? What is it that is causing these cases to lag in State courts or in Federal courts, both the trial courts or the appellate courts.

Senator KYL. Excuse me. By the way, I will get that written study to all of you so you can take a look at it.

Mr. WAXMAN. Very much appreciated. But I want to make a couple of points. First of all, the statute of limitations provision that AEDPA introduced, and Mr. Eisenberg referred to, and most of the provisions of the law that we are considering now, Section 2 and Section 4, for example, do not deal with how long cases pend in State courts or Federal courts. They talk about what claims Federal courts will be able to hear and how soon you have to get to Federal court, but they do not address the problem of lapses of time either in State court and Federal court, and you could have—and some partisans on each side have engaged in sort of a tit-for-tat debate about, well, you know, there is one State court case where there is a totally innocent guy and the State court has refused to rule for two decades. Brian Stevenson had some of them. There are other cases where we have heard about a Third Circuit case—I have forgotten the case, Abu somebody or other—where the Third Circuit just has not ruled in—there is not even a briefing schedule.

We have a very large system and there are always going to be cases where delays are perplexing and inexcusable. The question is, is there a systemic problem, and if so, what is it? Now, if the problem is lapses of time in State or Federal courts, that ought to be addressed. It ought to be addressed either with rigid limits or with some sort of flexible limits or presumptions to get the courts to give the kind of priority that the Congress concludes these cases should have, with a reporting requirement to the Administrative Office if it is not decided, or to the Chief Judge, or something like that. But rules about procedural default and exhaustion and things of that nature do not address at all how long things take in court. In fact, they extend the amount of time that things take in court.

I mean you have now provisions in this law that—I will go to the question of what the study shows about the length of time that Mr. Eisenberg was referring to. As Judge McKibben has explained, just in the last few years the Supreme Court has decided 19 cases interpreting resolving interpretive difficulties in AEDPA. While each one of those cases was proceeding, the lower Federal courts basically held their cases. The supreme courts granted cert on a question about what this language means and does not mean, and for the most part, those cases sat in the lower Federal courts until the Supreme Court decided it.

So the period of time that the Administrative Office studied was a period in which there were almost two dozen provisions of AEDPA that were being—whose meaning was filtering its way through the Federal courts and was being resolved by the Supreme Court. I could go through this proposed legislation and identify phrases or tests or standards that are applied, for example, you know, under Section 5. The tolling provision relates to a properly filed State court petition.

I do not mean to be a cynic, but I am rapidly approaching you 54th birthday and I have been in the practice of law a long time. There will be enormous litigation over the application of that new standard, a properly filed petition, to the facts of dozens and dozens of cases. And as sure as the sun sets in the west, there will

be conflicting interpretations. It will go up eventually to the Supreme Court, and dozens and dozens and dozens of cases will be held up while the interpretive process of this body of the Congress's latest effort to inject new standards into an already complicated area gets resolved.

I think that it is, Senator Kyl, with respect to counsel, I said before—and I know you are not only fishing for compliments for your State, but I think Arizona is the one State that has made a serious effort to comply with Chapter 154. It may have taken longer than it should have. The Ninth Circuit may or may not have been right in denying application of the benefits of that regime in the actual case in which it decided that the State had qualified. But what I find very telling is that Arizona really does stand alone. There really is no other State that has tried to avail itself of the Chapter 154 procedures. There were a couple of States early on which basically said, we either have counsel or we would like to have counsel, please allow us in, and those were plainly non-meritorious claims.

The next closest State, it happens geographically, is Senator Feinstein's State, California. California instituted a mechanism. It tried to get this adjudicated. It tried to qualify through by means of a suit under Section 1983. It went all the way to the Supreme Court of the United States, which about 10 years ago said, "No, no. This has to happen in habeas." Since that time I am not aware of any effort by the State of California to improve its standards or to even raise this issue again. I am not criticizing California. California is the next best example, but I think before tinkering with Section 154, which I think was a good idea, I think that the Senate ought to look at why it is that States are not trying to do it.

I suspect that what the data will show are that it is for either one or both of the following reasons: either because the existing doctrine, as narrowed by the Supreme Court prior to AEDPA and as changed by AEDPA, has proven by and large so satisfactory to prosecutors, that there is not really any great compelling—there is no felt need to try and qualify for the even stricter standards under Section 154, and there are many States in this union for whom qualification under 154 would be an amazing sea change, States where there is no system of indigent defense period, let alone in post conviction, and the steps that would be required to qualify seem like a bridge too far.

So I certainly supported at the time and continue to support the principle that more stringent standards apply under Section 154 to States that actually provide competent counsel, but I do not think that it would be wise or that we have any data on which to tinker with Section 154, because thus far only one State has sought to comply, it has now been certified, and we do not really have—enough time has passed to know exactly how the Ninth Circuit in particular will treat Arizona now that it has in fact complied.

Judge MCKIBBEN. This is an important issue and I do not know if I could have just two minutes to followup on the opt-in provisions under 154, Mr. Chairman.

Chairman SPECTER. Please go ahead, Judge McKibben.

Judge MCKIBBEN. I did secure yesterday some preliminary statistics in this area because I was trying to determine what other

States have taken the major steps that Arizona has, as Seth Waxman has already indicated, which I think are substantial. Not many States have done that and come as close I think as you can come to qualifying in the Spears decision and probably will in the future. But it appears that there have been five States that have reasserted their entitlement to opt in to 154, and Arizona is one of them, and Maryland, Ohio, Florida and Mississippi. There have been 12 States that have been denied certification, but they have never reapplied for certification since the denial, and 19 States have not ever applied for certification or opt-in under 154.

That would seem to suggest that the mechanism for opting in under 154 is one that the States are aware of, but by and large the States have not certainly made the effort that Arizona has to attempt to opt in.

I think it is something that the Committee should study long and hard before making the decision to shift the responsibility for making the decision whether or not the State qualifies for opt-in status from the courts to the Attorney General as suggested in the statutory provisions. When the Powell Committee adopted the report through the Conference, there was certainly a role for the Federal courts to play at that time, and I do not think there is any empirical data to suggest that the procedure has not been appropriately considered by the courts in resolving whether or not a State has appropriately opted in. In fact, in the Arizona case it was conceded that they had not complied strictly with the provisions, and the question was whether the Ninth Circuit properly determined that that should be waived.

Senator FEINSTEIN. Mr. Chairman, on this point, because I have to leave, something has just been brought to my attention about California. Might I just mention it to the panel and see if the know about it?

Chairman SPECTER. Yes, you may, Senator Feinstein. And I know the sequence is unusual and causing concerns all around. So I am going to ask the panel to be very brief in responses so we can move to Senator Leahy and the other members.

Senator FEINSTEIN. And I will try and be very brief.

It is my understanding that there is now a joint task force between the Ninth Circuit and the State of California that is trying to address these issues, and that a disproportionate number of capital habeas cases involving delays in over a decade come from California. What I am told is that all habeas cases are automatically heard by the California Supreme Court. However, due to the volume of cases before it, the Court does not have time to grant hearings, and generally issues what is called a "postcard denial." Consequently, when cases are appealed to the Federal Court there is no record to rely on, and the judges have to start over from scratch, causing delays and often requiring hearings at that point, which take additional time.

Is this in fact correct to the best of your knowledge? Would that account for the problem in these capital habeas cases from my State?

Judge MCKIBBEN. Well, from speaking with my colleagues in California and particularly in the Central District, the Northern

District and the Eastern District, where they have the great volume of those cases, there is every indication that when the case is filed in Federal court that a great deal of the record may have to be developed in the Federal court, and that is extremely time-consuming if those matters are not fleshed out by the California Supreme Court.

Now, whether or not there is an intermediate Court of Appeals that resolves some of those issues, I cannot say because I am not that familiar with the California practice.

Senator FEINSTEIN. Because I do not know whether the long cases that Senator Kyl is referring to are essentially California cases, the 20-year case, but there should not be any excuse for that in my view. And if these are the postcard denials that then do not have a record, and then go to Federal court, and then the whole thing has to start again because the State court is not doing what it should, we should know that and correct it.

Judge MCKIBBEN. Having the records in Federal court—you know, as a judge, it is extremely important to have that record and have it early. We have a case in Nevada—and it is partly out of California—in which the record is over 400,000 pages.

Senator FEINSTEIN. If anybody has anything to add to that. But I am going to look into that one aspect with the California Court, Mr. Chairman, because this is kind of news to me.

Chairman SPECTER. Thank you, Senator Feinstein.

Senator Leahy.

Mr. EISENBERG. Mr. Chairman, might I say a word about the postcard denials very briefly?

Chairman SPECTER. Yes, you may.

Mr. EISENBERG. I appreciate it. Thank you.

Chairman SPECTER. To the extent you can make it brief, we would appreciate it.

Mr. EISENBERG. Senator, my understanding is that in many of those cases of postcard denials, the reason for the denial is essentially a procedural default, a timeliness ruling. And when the case gets to Federal court they should not be starting over from scratch. They should be applying the default. And much of the litigation in California cases, I believe, has been the result of the failure to apply those defaults.

When the case gets to the California Supreme Court, moreover, it has already been typically through other courts along the way up, both on direct appeal and collateral review, and therefore, there is going to be some disposition of those claims either on procedural grounds or substantive grounds from the lower courts that the Federal courts should be looking to and deferring to to the extent that they can reach those claims at all.

I think the delays that we are talking about, the time periods that you are hearing, are the time from when the case gets to Federal court, not the time that it is spending in State court, and I think that those delays are difficult to explain.

Chairman SPECTER. Senator Leahy.

Senator LEAHY. Mr. Chairman, I would ask first to put in the record a number of things, including the ABA's concerns about this.

Chairman SPECTER. Without objection that will be made a part of the record.

Senator LEAHY. Judge McKibben, you will not recall this, but we met not long after you became DA of Douglas County?

Judge MCKIBBEN. That is correct.

Senator LEAHY. I was out there for a prosecutors' meeting. I had hair then. So did you. You still have yours.

[Laughter.]

Judge MCKIBBEN. Barely.

Senator LEAHY. Mr. Waxman, I found out this morning that a modified version of a provision from this bill has been slipped into the current draft of the House-Senate Conference Report on the PATRIOT Act reauthorization provision. The reason for some of the surprise is neither the House nor the Senate PATRIOT bill, actually neither the House nor the Senate has ever passed this provision in any form. As it appears in the Conference report which we just got a couple of hours ago, the provision would shift from the Federal courts to the Attorney General of the United States, the responsibility for determining whether the State has established a qualifying mechanism for providing competent counsel to indigent defendants in State post-conviction proceedings, and that would be subject to review by the D.C. Circuit.

The Attorney General would write the rules for certifying State systems. States need only substantially comply with the statutory requirements in order to qualify. Once a State has been certified, and that certification has been upheld in appeal, there is no apparent way for a State to be decertified, even though they may decide to totally change their system after getting certification.

I had my staff provide you with a copy of the new proposal. I think you have probably had about 5 minutes to take a look at it.

Assuming the proposals I described, what do you think of that?

Mr. WAXMAN. Well, I would not favor it. I did get a copy of it just before the hearing started, and I cannot say—I am not an expert at reviewing legislation, and I cannot say that I completely understand what the text provides. But my views about—

Senator LEAHY. I am not asking you to go into the question that was not considered by either the Senate or the House. It was just kind of slipped in in the middle of the night by—

Mr. WAXMAN. I think that it is dismaying to include in legislation dealing with the very serious problem of terrorism, a provision that, at least so far as I understand it, has nothing to do with that, and that was not considered by or voted out of either of the two Judiciary Committees that have now held two hearings on this procedure. And so on procedural grounds I guess I am sort of surprised about this.

If I understand the legislation, it would allow the Attorney General of the United States, not only to make the decision about whether States qualify for Chapter 154, but also to set the standards that constitute qualification, whereas now in AEDPA, AEDPA actually includes statutory standards.

I certainly do not think that the statutory provisions themselves for qualification ought to be changed. I cannot even imagine what the reason is why the Attorney General would have authority to do

that. But I also think that it is a very grave mistake and an unwarranted act to take the process of certification, which is essentially an adjudicative process, away from an Article III court and give it to somebody who, as I said in my written testimony, whoever the Attorney General is, whatever their views are, is in the context of an adversarial system of criminal justice is a prosecutor.

Senator LEAHY. Correct.

Mr. WAXMAN. If I could just finish my sentence. That is why, for example, when the Justice Department participates in State habeas litigation in the Supreme Court, it either participates on the side of the prosecution or it does not participate at all. I am not aware of any instance—there may be one, but it would certainly be the exception that proves the rule—where the Attorney General comes into Federal courts in State habeas proceedings on behalf of the prisoner, but there are many instances in which I and other Solicitors General have filed amicus briefs in support of the State. So I just think there is an appearance issue, and since there is no evidence of any State that has made a serious effort to try to get into Chapter 154 other than Arizona, which has been certified, I just do not think there is any cause to turn this decision over to the Attorney General.

Senator LEAHY. Mr. Eisenberg suggested that the cause and prejudice test was satisfactory before AEDPA was enacted, but has become a problem since then. Do you agree?

Mr. WAXMAN. I know of no evidence whatsoever to support that assertion. I mean he is referring to a particular, I guess, Third Circuit decision. I am not familiar with the decision. I certainly could look at it, but the notion that the cause and prejudice standard has now risen like Frankenstein from the crypt to become a problem as a result of AEDPA is a perplexing one to me. I do not think that the data would bear that out.

Senator LEAHY. I will set an example by being the only person who sticks within their time, and I will submit my other questions for the record, Mr. Chairman, but I do have a number of questions.

Chairman SPECTER. Thank you very much, Senator Leahy.

Senator Kyl, would you object if we went to Senator Feingold next?

Senator KYL. No, not at all, but I do have some—

Chairman SPECTER. We will come back to you.

Senator Feingold.

## STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. I do want to thank you for holding this hearing today on the Streamlined Procedures Act. I am always sincere when I thank you, but I am especially sincere about it today.

You and others on the Committee have been working over the past few months to make changes to this extremely complex bill, and I am gratified that we have witnesses here today who can help us better understand the bill in its current form, as well as the very serious implications this bill could have for our criminal justice system.

Mr. Chairman, I think this is how the Senate should work. Before we proceed to report out complex legislation like this bill, we must be fully armed with the facts needed to evaluate it and allow us to make an informed recommendation to the rest of the Senate, and this hearing is an important step in that process, and again, I thank you for your willingness to do it at a convenient time.

Mr. Chairman, I would ask that my full opening statement be placed in the record.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Senator FEINGOLD. Mr. Waxman, let me begin by following up on Senator Leahy's question. I am trying to better understand this habeas language that we understand could be in the PATRIOT Act reauthorization Conference Report. As I understand it, it allows the Attorney General to certify a State to opt in to Chapter 154 with D.C. Circuit review of that certification.

As I read the provision, the opt-in procedures would go into effect as soon as the AG certifies the State before the D.C. Circuit reviews it. Is that correct, and is that not problematic?

Mr. WAXMAN. I do not know if it is correct, but if it were it would be yet another reason why this legislation is problematic, as is, for example, Senator Leahy mentioned, that apparently the legislation does not include any provisions for decertification. Once you have got your delicatessen ticket you would be sort of in line forever, if I can really mangle a metaphor.

Senator FEINGOLD. Let me go to Section 5 of the bill that modifies the rule for tolling the 1-year statute of limitations on Federal habeas petition. Can you explain how that section would change current law and whether you think the change is justified?

Mr. WAXMAN. I do not think that the change is justified, at least I do not know of any data or analysis that would suggest there is any reason to change it, but AEDPA, for the first time in our history, enacted a statute of limitations for access to Federal habeas corpus. Many people thought at the time that the whole notion of a statute of limitations was completely antithetical to the Writ of Habeas Corpus as it has been known and practiced ever since magna carta, but concerns about delays in getting to Federal court prompted the Congress to take this unprecedented step.

Now, questions have come up since AEDPA was enacted about the 1-year statute and what days get counted and not counted. AEDPA has a sensible rule that while cases are pending in State courts, while State courts actually have the case, you cannot charge the petitioner, the prisoner with that time. But the question is what about the periods in between? I would have though that the law as the Supreme Court has explicated the 1-year provision under AEDPA is both clear and manifestly appropriate. The language that Section 5 now uses to alter the existing tolling regime is very unclear. It is not clear what is meant by the terms "original write" or "properly filed."

I think it is a mistake for it to limit the tolling periods for only for the filing, adjudication of Federal claims, rather than claims that are pleaded as State constitutional violations, but as to which

evidence is subsequently revealed, constitutes a Federal constitutional claim. Here is my overriding point: I do not know, I simply cannot understand what this provision is trying to address. If it is trying to address anything other than the unique California system of successive original writs rather than the normal process of applying and appealing to a higher court.

If it is trying to address something other than California, I cannot imagine what it is other than the doctrine, as Mr. Eisenberg mentioned, of equitable tolling. I do not know of any data—and I would be surprised to see it—that the principle of equitable tolling, that safeguard of equitable tolling, is in fact a systemic problem or is being abused in any way.

Senator FEINGOLD. And it applies in all cases, not just habeas cases, right?

Mr. WAXMAN. Yes, it is what courts do.

Senator FEINGOLD. Then why would we want to make a special exception not to explain this general doctrine in habeas cases where individuals' lives and liberties are at stake?

Mr. WAXMAN. I do not know, and I do not even know that there is a problem that it is seeking to address.

Senator FEINGOLD. Do you think Section 5 should be taken out of the bill?

Mr. WAXMAN. I do, and I think even with respect to California—I litigated *Carey* v. *Saffold*, which is the Supreme Court decision that is held up as one in need of remedy. I just want to say that California has chosen its own system for how it wants to administer its post-conviction proceedings. It has done so fully cognizant of how long its own State chosen system takes, and if there was any doubt about it whatsoever, it certainly became aware of the habeas consequences after the Supreme Court decided *Carey* v. *Saffold*.

Now, I understand that prosecutors in California object to California's system of post-conviction review, and I think actually if I were a prosecutor in the State of California, I would too. But I think that they are bringing their case to the wrong legislature. I think their case needs to go to the legislature of California which has made a sovereign choice. I view an attempt to sort of legislate these time limits for the special case of California to be profoundly inconsistent with principles of federalism.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Feingold.

Senator Kyl.

Senator KYL. Thank you, Mr. Chairman. I really want to get into the Section 154, but I wonder, Mr. Eisenberg, if there is any response that you want to make to the last colloquy between Senator Feingold and Mr. Waxman. If so, please do at this time.

Mr. EISENBERG. Thank you, Senator. I would like to discuss the notion that California has essentially chosen its own delay by virtue of its own State system. We live in a Federal system where the States get to choose varying ways of approaching these problems. It is not supposed to be the job of the Federal habeas corpus stat-

ute to mandate uniformity among the States in that regard, but take a look at Pennsylvania, which has chosen exactly the opposite approach from California. We have a system where cases move through post-conviction review in State court very much like in the Federal habeas corpus area. We have a 1-year deadline which is modeled after AEDPA, and yet our Federal courts have refused to give effect to those State rules in the same way that the Federal courts in California have refused to give effect to the rulings that are occurring there.

So the notion that it is because of the strange complexity of the California system that we have these delays in Federal court is false, and in fact, to look at the question more largely in terms of, for example, the counsel systems, if you look at the States that have done the most to address the counsel question—and by the way, my understanding is that Arizona still has not been certified despite its efforts in that regard, and that California was the State for whom the provision in Chapter 154 was most specifically crafted, and yet California has been held not to qualify.

The States that have done the most in providing counsel at the post-conviction stage, the State post-conviction stage, which is where Chapter 154 focuses, I would suggest are actually the States that see the longest delays on Federal habeas corpus review. In other words, those delays are not shorter. The provision of counsel systems in States like California, Arizona, Pennsylvania, where we have had mandatory appointment of counsel for State post-conviction petitions since long before AEDPA, in those States and in other States in areas around the country, outside the areas where the counsel complaints are usually made, Mississippi and Alabama and all those sorts of places, those are precisely the States where some of the longest delays are seen on Federal habeas corpus review, and the States which supposedly have the worst system of counsel, tend to be States which see some of the shortest delays on Federal habeas corpus review.

So the notion that there is some relationship between States not carrying the ball on their counsel systems and Federal courts having to delay on Federal habeas corpus, is false, it is exactly the opposite.

Senator KYL. It might be because there is good counsel in those States that are trying to comply.

Just one quick question, Mr. Waxman, and then a more complicated question. I am going to ask them both at the same time, so you are answering here. I referred before—I asked Judge McKibben, but I did not ask you—about the time limits that we include in the bill, the 300-day limit on issuing Court of Appeals opinion after briefing is completed and on the rehearing, a petition for rehearing, 90 days to rule on a petition for rehearing.

You talked about the fact it would be good to have a study to see really why delays were occurring, but that if it were—that it may well be appropriate to set limits. Would those limits be appropriate, in your view?

And then I am going to ask you one more question on my time.

Mr. WAXMAN. Is the next one the complicated one?

Senator KYL. It is actually not, but it takes just slightly longer to ask. I think that what Mr. Eisenberg just said about the Ninth Circuit decision in *Spears* v. *Stewart* is correct, that is to say that even though theoretically Arizona qualified in this one particular case, the benefits, the timelines were not allowed to be applied in the case, and the dissent in the case, 11 of the judges in the full Ninth Circuit review of the case, said the qualification aspect of it is strictly dicta, they would not apply it. In fact they said, quote, "To put it bluntly, neither we nor any other court is bound by the panel's advisory declarations in the case." It seems to me very uncertain that in any future case the Ninth Circuit, get two of the judges out of those 11 on your panel, clearly it is not going to qualify. In no case—in other words, have the benefits of 154 even been applied in Arizona, and so I am not nearly as sanguine as—well, I guess I should ask you how sanguine you really are that Arizona will receive the benefits of Section 154 in the future.

Mr. WAXMAN. First of all, with respect to the specific time limits in the bill, since I do not—I really have no idea why these cases that have been pending for a long time, why they have been pending for a long time, and so I guess I would not want to say whether I think these limits are appropriate or not. I mean certainly 300 days after briefing seems appropriate, but I cannot tell you the number of cases that I have argued more than 300 days before I have gotten a decision both in civil and criminal cases.

Senator KYL. [Off microphone.]

Mr. WAXMAN. Well, you know, I am an inpatient person and it is hard for me to remember these things unless I get a decision in real time.

In terms of Arizona qualifying or not qualifying, on a theory that no good deed ever goes unpunished, I now feel like I am being called upon to predict, to evaluate the extent to which Arizona really has done what is necessary to qualify, or the extent to which maybe it has not.

My understanding was that a majority of the court said that it had, and so long as it maintains a system that meets the AEDPA statutory standards, it darn well should continue to qualify. I have been handed a letter that the Public Defender's Office—very excellent as far as I can tell—Public Defender's Office in Phoenix submitted to Senator Leahy I guess last week, joining issue with Kent Ketane with whom I shared this table a few months ago, about the specifics of the cases, and I guess I would not want to cast my lot on the facts one way or the other.

My only point here is I certainly do not think we know whether or not Arizona will justly get its reward under 154 for a system that it has appropriately put in place. We are trying to divine essentially like a Rosetta Stone from the one decision that Your Honor—you have been called a judge, I will call you Your Honor even though you do not have a robe on. We just do not know, and in any event, I really do think that it would be a bad idea both in practice and in public perception to give this decision to the country's chief law enforcement prosecutor. I just think that—I do not think the case has been made for why that would be an appropriate thing.

Last, I realize I did not answer an earlier simple question that you asked me, which is, is it not the case that there is no cause and prejudice standard under Chapter 154, which is sort of viewed as this sort of stump-the-witness question since for the life of me, I cannot remember what is and is not in 154.

But now that I am looking at Section 2264(a)(A), I think the answer is that it does have a cause standard, but it does not even—if you meet the cause standard, you do not even have to prove any prejudice. Now it is a strict cause standard, but it does not have prejudice requirement, much less the, quote, "actual innocence or no involvement standard." I could be wrong, but that is the way I read it.

Senator KYL. I would want to take that further.

Mr. Chairman, I just make this point, since Mr. Waxman concluded his earlier answer with something which is pregnant with dispute. The exact reason why it makes sense to have the Department of Justice determine the compliance with the statute, to be reviewed by a Federal court, is because otherwise you have an ad hoc determination and precisely the issues raised by the *Spears* case, where the court says, gee, in this case it appears that you had a good set of counsel and so on, but we are still not going to apply it, and the other judges say, and we are not bound by this in any future case. You never have resolution. No one can rely upon the system either qualifying or not. You always know you are going to have a case made at the end of the day before a judge that the provisions cannot apply because the procedures were inadequately established, or the program was inadequately established, or operated.

It seems to me that having a determination made and then the court reviewing it in each case, is a better way to do it than having the court establish in each case whether you qualify preliminarily to even be able to argue that you can use these 154 expedited review standards.

That is my answer to your point.

Thank you, Mr. Chairman.

Chairman SPECTER. Mr. Waxman, my round of questioning has finally come, and I will begin with you, but with first an observation that it is not—and I know you are not representing to be an expert in Congressional practices, but it is not unusual to have something in a Conference report which is not part of the PATRIOT Act. We have quite a number of provisions which will be added to it.

With respect to this issue about the appropriateness of the Attorney General's certification, the Innocence Protection Act has an Attorney General certification. Would there be any reason to approve that and not a certification here?

Mr. WAXMAN. I am going to have to admit that I am not fully up to speed on the Innocence Protection Act and how the certification works. I was asked to give my opinion about some legislation that I only received after I was already sitting at this table and—

Chairman SPECTER. That is OK. You are not expected to be an encyclopedia, but there are quite a few provisions, and I have just consulted with my Chief Counsel, Mike O'Neill, who is a Professor,

and the thoughts come to mind about preclearance on the Voting Rights Act, which is an adjudicatory function. There are some provisions under Environmental Protection where the Department of Justice performs adjudicatory functions. There are preclearances on mergers, antitrust, where there is an adjudicatory function. And I believe that the Innocence Protection Act is a pretty good example. I am trying to determine whether there is even a court review of that. But that is a legislative matter for us in any event.

With respect to the issue of having the Attorney General make the determination, we are trying to move ahead on a question which is very problemsome we have not been able to answer. And I do think that Senator Kyl raises a very good point about what is happening to Arizona and could it be applicable to other States on an incentive to provide adequate counsel. The way the situation is now, it appears that other States are discouraged from doing so. But the provision which we are considering in the Conference report, nothing is final. It was not slipped in. It was something that I discussed yesterday with Senator Leahy, and I reminded him of that a few moments ago before he left. So that these disclosures are made, and you do not read about it after the fact. But it does require the statutory standards to be maintained, and it does have provisions for decertification.

Judge McKibben, thank you very much for being here, for your participation. Notwithstanding the objections which you have raised to the pending proposals, do you think that the habeas corpus procedures ought to be modified by any new Federal statute?

Judge MCKIBBEN. Well, I think that the Committee should move slowly in this area until there has been an opportunity to determine if there are in fact any type of systemic problems on delay. As I understand it, the principal reason behind this legislation is that there have been indications that in some districts, cases may have been delayed in the disposition process. And I think until the study is undertaken to examine that and review those cases, and see if in fact there is any type of systemic problem—

Chairman SPECTER. Do you know of no systemic problem yourself?

Judge MCKIBBEN. I am not aware of cases that have been unduly delayed between the time that they come into Federal court and when they go back to State court. There may well be some delays in State court. That is inherent in the process that we have in federalism and comity. I know Seth Waxman indicated that there are occasions where the court asks the prosecutor if they are willing to waive unexhausted claim issues and not have them go back to the State court, have them resolved in Federal court, which certainly would expedite the process. But as long as we consider comity and federalism to be an important doctrine, which we certainly do, that is going to be inherent in the process. And, changing the statutory scheme and the standards for being able to secure review, I think is going to complicate the process. We are going to be litigating that for the next 8 or 10 years.

Chairman SPECTER. Mr. Waxman, do you know of any provision that ought to be modified, if there is any useful addition by Federal legislation on this issue at this time?

Mr. WAXMAN. I am not. One way, as I indicated at the outset, I think that it may well be that there are enduring problems either that have persisted notwithstanding the enactment of AEDPA, and/or problems that have been created, a level of unfairness that has been created by AEDPA, all of which would be appropriate for legislation, but I do again urge the Committee and the Congress to reach out to the AO and the Conference of State Chief Judges, and the Federal Judicial Center. Let's get the data and some analyses and identify what are the problems that have either on a systemic basis persisted and why, and what problems has AEDPA perhaps—

Chairman SPECTER. I am just asking if you know of any, and the answer is no.

Mr. WAXMAN. No.

Chairman SPECTER. Senator Feingold, I understand you want another round, which is certainly a more modest request than another hearing.

[Laughter.]

Senator FEINGOLD. Mr. Chairman, you were kind to allow this hearing, and I am not even going to use a whole round. I just want to ask Judge McKibben a couple of questions.

Chairman SPECTER. Do not forget the hearing before this too.

Senator FEINGOLD. I was happy about that hearing too.

[Laughter.]

Senator FEINGOLD. I will try to be brief.

Chairman SPECTER. You are recognized, Senator Feingold, for however long you like up to 5 minutes.

[Laughter.]

Senator FEINGOLD. That is what I thought. Thank you, Mr. Chairman.

Judge, the vast majority of Federal habeas cases are in non-capital cases, is that not right?

Judge MCKIBBEN. That is correct, about 18,000 a year.

Senator FEINGOLD. And individuals who have been sentenced to a prison term or even life imprisonment really have no incentive to delay their legal proceedings, do they?

Judge MCKIBBEN. Not to my knowledge. The sooner they can have the matter disposed of, particularly if it is favorable, the sooner they would be released if they are successful.

Senator FEINGOLD. So when we are talking about those kind of cases, there is not even any potential for the kind of dilatory tactics that some Senators are worried about, is that not correct?

Judge MCKIBBEN. The Conference has expressed that in the communications I have provided to the Committee. That is correct.

Senator FEINGOLD. Judge, one of the big problems with erecting extremely complex procedural barriers in habeas cases, as we have talked about, is that many State defendants are navigating their State systems with no counsel or with an attorney who is overworked, underpaid and has no investigative resources. Does the statute here help to address in any way situations in which petitioners had no counsel or incompetent counsel in State court?

Judge MCKIBBEN. That is one of the concerns the Conference has. It seems to me that part of the problem here is ensuring that

there is competent counsel throughout the State process, and that would include post-conviction. If you have competent counsel, then it makes it much easier to navigate the post-conviction review in the Federal courts.

A great number of the cases that we have, the petitioners do not have counsel, and the petitions get filed, and then you go through the amendment process where they have to refine it and we have to try to understand it. We have a special Habeas Unit in our court that works with that because they are able to look at those petitions, most of them, many of them handwritten, and attempt to discern exactly what it is that is being set forth. And then they have an opportunity for amendment.

This bill does not really address that issue, and I think that is a core issue that has to be resolved before we will be able to expedite these cases in the future, more so than is being done now.

Senator FEINGOLD. I thank you, and I thank all the witnesses. And again I thank you, Mr. Chairman, for the hearing.

Chairman SPECTER. Thank you very much, Senator Feingold.

Senator Kyl, you had the first word on this bill, and you may have the last word.

Senator KYL. Thank you, Mr. Chairman. There is so much more we could talk about. I have got a whole series of questions here. I think probably that we have imposed upon our witnesses long enough in this open hearing. But I do think the process of working around a table has helped. And if we do not presume too much more on the experts' time here, I would hope for that opportunity in the future as well.

We certainly have not rushed this now. I mean it has now been almost 6 months, and it is important business to take the time and do it right. I just hope that we can get beyond what I said in the beginning is undoubtedly a clash of two points of view that are difficult to reconcile about the use of habeas corpus, and perhaps also come to an agreement that if the statistics do reveal significant problems, particularly in the capital cases, as the Arizona study—which I will share with you—I think does, that armed with that information, we would be willing to make some changes statutorily. It is perfectly appropriate for us to legislate in this area. I think we all agree with that.

And the notation that you made about the number of Supreme Court cases that have just now come to fruition and provided guidance is an illustration of the fact that if we get it right—it is a big "if"—but if Congress gets it right in the way that it writes legislation, we can express intent and clear up issues and provide clear guidance across the board, and in many respects more specifically than the courts do it through the cases that may or may not come before them with particular fact situations they have and the like.

It is hard to make law in this area through case law. And what we are trying to do here is be specific and precise and general in our application to everybody, rather than just having ad hoc determinations that may or may not have precedential effect, and that differ in facts, and therefore are of limited value in other situations, and which make it—I think Mr. Waxman, you said—one of the more esoteric areas of law that has a great deal of unsettled

aspects to it. We are trying to settle some of those, and that is our intention here.

So if you grant that the legislature has that potential if we do it right, I would hope you would continue to work with us to try to help us get it right so that we can provide more certainty and at least in States that are really trying hard. I mean Arizona spends like $60,000 on the average case, and on the difficult cases it is far more than that. I am quite familiar with the process. They are really trying hard and have been for a number of years. I think it is discouraging when other States see that it does not seem to have the intended effect in terms of the certification. so that is my plea. I again express my gratitude to all of you and the others who have helped to work on this, and hope, Mr. Chairman, that we can continue to try to work this issue. And thank you again.

Chairman SPECTER. Thank you very much, Senator Kyl.

Thank you, Judge McKibben and Mr. Waxman and Mr. Eisenberg.

That concludes our hearing.

[Whereupon, at 11:45 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

# QUESTIONS AND ANSWERS

## COMMITTEE ON FEDERAL-STATE JURISDICTION
## of the
## JUDICIAL CONFERENCE OF THE UNITED STATES

United States District Court
400 South Virginia Street
Reno, Nevada 89501

January 13, 2006

Honorable Howard D. McKibben
Chair
Honorable Ralph J. Cappy
Honorable Kurt D. Engelhardt
Honorable Ronald Lee Gilman
Honorable Janet C. Hall
Honorable Leroy Rountree Hassell, Sr.
Honorable Kermit V. Lipez
Honorable Michael P. McCuskey
Honorable James D. Moyer
Honorable Michael R. Murphy
Honorable Robert E. Nugent
Honorable Linda Copple Trout
Honorable Roger L. Wollman

(775) 686-5880
Fax (775) 686-5887

Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Mr. Chairman:

Enclosed please find my written responses to questions posed to me by Senator Patrick Leahy following the November 16, 2005, hearing regarding "Habeas Reform: The Streamlined Procedures Act."

I appreciated the opportunity to present the views of the Judicial Conference on this important legislation and would offer whatever assistance you and other members of the Committee deem appropriate as the Committee continues its consideration of this legislation.

Sincerely,

Howard D. McKibben

Enclosure

cc: Honorable Patrick J. Leahy,
Ranking Democrat, Committee on the Judiciary

**Hearing Before the Senate Judiciary Committee on "Habeas Reform: The Streamlined Procedures Act"**

**November 16, 2005**

**WRITTEN QUESTIONS FROM SENATOR PATRICK LEAHY FOR JUDGE HOWARD D. MCKIBBEN**

**Question 1:**

In your statement, you urge Congress to evaluate whether there are any unwarranted delays occurring in the application of current law in resolving habeas corpus petitions filed in the federal courts by state prisoners, and if so the causes for such delays, before rushing to pass legislation intended to reform habeas procedures. Do I understand correctly that you do not think we should be doing this at all – not, at least, until we have reliable evidence that the reforms we adopted nine years ago in AEDPA need adjustment?

**Answer:**

That is correct Senator Leahy. The judiciary understands the perception of the sponsors of the legislation that there may be unwarranted delay in the handling of some habeas petitions filed by state prisoners in the federal courts, particularly with respect to capital cases. As the judiciary noted in its letter to members of the House and Senate Judiciary Committees in September 2005, the preliminary information compiled by the Statistics Division of the Administrative Office of the United States Courts indicates that with respect to capital cases, the median time from filing to disposition has increased in both the federal trial and appellate courts, and the number of capital cases pending for three years or more has also increased. Without further information, however, the judiciary is unable to draw a definitive conclusion as to the causes for the increases or to reach the conclusion that these time frames are unreasonable in light of the complexity of capital federal habeas corpus jurisprudence.

At the same time, with respect to state non-capital habeas corpus cases, the median time from filing to disposition in the district courts has remained relatively constant since 1998, and in 2004 was six months. In the courts of appeals, the median time from filing of notice of the appeal to disposition of state non-capital habeas corpus appeals also remained relatively stable between 1998 and 2004, ranging from 10 months to 12 months.

As you know, the Judicial Conference has urged that a study be undertaken to look at the impact of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) on the handling of habeas petitions filed by state prisoners in the federal courts. A study would enable the judiciary and Congress to better determine what can be done internally by the judiciary, or legislatively by Congress, to address specific concerns, without a comprehensive revision of the habeas corpus statutes.

**Question 2:**

Judges, lawyers, and professors constantly argue that habeas corpus is far too complex and that its complexity makes it inefficient and slow. This bill is supposed to streamline procedures. Do you think it will have that effect? What do you think the impact of this bill would be on the time it takes courts to resolve habeas cases?

**Answer:**

The complexity of habeas corpus reflects the efforts of Congress and the courts to strike the proper balance between respect for state review of criminal convictions and maintenance of a fair opportunity to raise federal constitutional claims in federal court. AEDPA codifies a deferential standard for the review for constitutional claims that the state courts have reached and decided on the merits, and it also places important restrictions on the ability of the federal courts to reach and resolve claims that a petitioner has failed to raise in state court.

It is unlikely that this bill will streamline habeas corpus procedures. If Congress substantially revises the procedures in habeas corpus cases, there is a legitimate concern that it most certainly would invite a new round of litigation on statutory and constitutional issues raised by the revision itself, complicating and protracting, not expediting, the consideration of habeas petitions in the federal courts. The result would likely be further delay. Federal courts have worked for the past ten years to interpret the meaning of AEDPA. As I mentioned in my testimony before this Committee in November 2005, in just the past three years, the Supreme Court has considered more than 19 cases addressing issues raised by AEDPA. Nine of those decisions were handed down in the last term. I should note that on January 10, 2006, the Supreme Court issued another decision interpreting the provisions of AEDPA. *See Evans v. Chavis*, 2006 WL 42398 (Jan. 10, 2006).

**Question 3:**

Isn't it true that the delay we see in some cases is due to the states' insistence on extending litigation over procedural rules they hope will bar federal courts from reaching the merits and deciding whether prisoners' federal rights have been violated?

**Answer:**

We have heard that criticism, but without a detailed study of the various factors that contribute to the delay in processing certain federal habeas petitions, we cannot be certain how much this factor adds to the length of habeas proceedings. Federal habeas review certainly respects the right of state courts to require that their own procedural rules are followed. Both the procedural default and exhaustion doctrines are designed to recognize these important state interests. It should be noted, however, that states that are

concerned about delays can forgive the procedural default and/or failure to exhaust and encourage the federal habeas court to reach the merits of the constitutional claim.

**Question 4:**

What has your experience been with respect to the handling of habeas cases over your career, and what concerns do you have with the pending legislation? What are the most problematic provisions you see with the legislation?

**Answer:**

Over the time I have served as a federal and a state district court judge, I have handled numerous non-capital habeas corpus petitions and several capital petitions. Some of the capital cases I have been involved with were resolved quickly, others required more time. In every case, I had the responsibility for ensuring that habeas corpus petitions were given full and fair consideration in the most expeditious manner possible. During my tenure as a federal judge, I have certainly seen changes in how the federal courts review habeas petitions filed by state prisoners. The cases, particularly capital cases, have become more complex, both factually and legally, and the transcripts more voluminous over the years. In addition, it has become increasingly difficult to secure competent counsel to represent petitioners in capital cases.

As a representative of the Judicial Conference, I would reiterate the concerns identified by the Conference in its September 2005 positions. The Conference expressed opposition to provisions in the Streamlined Procedures Act that have the potential to undermine the traditional role of the federal courts to hear and decide the merits of claims arising under the Constitution; impede the ability of the federal and state courts to conduct an orderly review of constitutional claims, with appropriate deference to state-court proceedings; and prevent the federal courts from reaching the merits of habeas corpus petitions by adding procedural requirements that may complicate the resolution of these cases and lead to protracted litigation.

**Question 5:**

Section 2 of the bill deals with "unexhausted" claims, and Section 4 deals with "procedurally defaulted" claims. Can you distinguish between the two and explain why they should not be handled in the same way?

**Answer:**

The distinction between procedural defaults and unexhausted claims lies in the rules that govern the presentation of federal constitutional claims to the state courts. The exhaustion doctrine requires that all federal claims be first presented to the state courts for consideration; the procedural default doctrine requires federal courts to give effect to state court decisions to treat certain procedural mistakes as a bar to the adjudication of the

merits of a federal claim. In the leading case, *Wainwright v. Sykes*, 433 U.S. 72 (1977), the petitioner wished to challenge the use at trial of a statement he made to the police. He had not challenged the admission of the statement at trial, and his failure to do so potentially constituted a procedural default. But before commencing his federal habeas proceeding, he was first required to submit the unexhausted claim to state court, which he did through a state post-conviction proceeding. In the course of that proceeding, the state court ruled that the claim was barred due to the procedural default at trial. Having exhausted the claim, the petitioner sought relief from the procedural default in a federal habeas proceeding. On review, the Supreme Court held that federal courts should respect that procedural default finding unless the petitioner could meet the now familiar cause-and-prejudice standard. In short, the exhaustion doctrine requires the habeas petitioner to seek relief first from the state courts, whereas the procedural default doctrine applies once the petitioner has filed an exhausted claim in federal court seeking to overturn the state court's refusal to reach the merits of a defaulted claim.

The exhaustion requirement includes a number of current exceptions to deal with situations in which the state court offers no corrective process or has clearly rejected the claim in a very similar case. Federal courts now have authority to excuse a failure to exhaust for such reasons, but these reasons are quite different from those that would govern a decision to forgive a procedural default under the cause-and-prejudice standard. Forgiveness of exhaustion often focuses on the adequacy of available state court post-conviction remedies, whereas procedural default issues focus on whether the petitioner can justify or excuse a procedural error that took place, usually at the trial of the case.

**Question 6:**

Does the bill adequately address situations in which petitioners had no counsel, or incompetent counsel, in state court?

**Answer:**

The bill does not appear to address the numerous situations where petitioners had no counsel, or incompetent counsel, in state court, except in its effort to streamline the approval process for expedited review of death penalty cases under chapter 154 of title 28, United States Code. At present, petitioners have a federal constitutional right to counsel, under the Sixth Amendment, at trial and on direct appellate review, but not for habeas proceedings in state court. Many habeas corpus petitions filed in the federal courts are submitted by petitioners who did not have counsel or had incompetent counsel in the state court proceedings and therefore did not file a state court petition, or filed an inadequate petition. Given the procedural requirements in this bill, petitioners who lacked counsel or who had incompetent counsel in state court may find themselves unable to raise important constitutional issues in federal court. I think this is an important issue that deserves greater attention.

**Question 7:**

The bill would eliminate equitable tolling. Can you think of circumstances under which equitable tolling should be preserved?

**Answer:**

The Supreme Court has taken a narrow view of the availability of equitable tolling. It is my experience that federal courts will not apply this doctrine except in extraordinary circumstances. Limited equitable tolling permits the court to provide some relief from the one-year statute of limitations in those rare cases where a prisoner, through no fault of his own, has been prevented from complying with the statute of limitations. Such equitable tolling might be applied, for example, in favor of a petitioner who lacked the ability to meet the deadline, perhaps due to a mental or physical disability.

**Question 8:**

What is the Judicial Conference's opinion concerning the current proposal to shift from the federal courts to the Attorney General of the United States the responsibility for determining whether a state has established a qualifying mechanism for providing competent counsel to indigent defendants in state post-conviction proceedings?

**Answer:**

The Judicial Conference opposes this provision of the legislation. As noted in its July 13, 2005 letter to members of the Senate Judiciary Committee, when the Judicial Conference adopted the 1989 Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (the Powell Committee Report) upon which chapter 154 of title 28, United States Code, was based, the Conference contemplated that the federal courts would assume a critical and continuing role in determining the adequacy of state mechanisms for providing counsel and whether a state has complied with the requirements of 28 U.S.C. § 2261(b) and (c). This is an adjudicative function and it should remain within the jurisdiction of the federal courts.

It is my understanding that one of the reasons behind the change to shift the responsibility for determining state compliance from the federal courts to the Attorney General of the United States is a belief that the federal courts are reluctant to find that a state has in fact established a system for providing competent counsel because a federal court would then be required to consider capital cases falling under chapter 154 on an expedited basis. We are not aware of any evidence to support this assertion. Furthermore, it is important to note information compiled by the Administrative Office indicates that very few states have reasserted their entitlement to opt in to chapter 154 after a federal court denied their initial application. A number of states that have been held not to meet the requirements for certification have not reapplied for certification.

Moreover, 18 states that permit the death penalty have never applied for certification or opt in under chapter 154, and one state filed and withdrew its application.

Finally, I note that Seth Waxman, the former Solicitor General of the United States, in his written testimony before this Committee in November 2005, stated that the Justice Department often joins the states as an *amicus curiae* in state habeas litigation in the Supreme Court but could not recall any instance in which the Department did so on behalf of a prisoner.

The Attorney General is a prosecutor, and placing responsibility for determining whether a state has qualified under Chapter 154 may raise significant questions of fairness and impartiality.

**Question 9:**

Is the Judicial Conference committed to continuing to work with this Committee in coming months to gather and analyze the data necessary to determine where delays exist, what causes those delays, and if and how we can most judiciously help to fashion remedies to alleviate those delays?

**Answer:**

Yes. The Judicial Conference and the Administrative Office of the U.S. Courts are committed to providing whatever assistance we can to members of the Senate Judiciary Committee to assist in gathering and analyzing appropriate data.

SUBMISSIONS FOR THE RECORD

**STATEMENT OF**

**PROFESSOR ERIC M. FREEDMAN**
**MAURICE A. DEANE DISTINGUISHED PROFESSOR OF**
**CONSTITUTIONAL LAW**
**HOFSTRA LAW SCHOOL**

**ON BEHALF OF THE**

**AMERICAN BAR ASSOCIATION**

**submitted to the**

**COMMITTEE ON THE JUDICIARY**
**UNITED STATES SENATE**

**on the subject of**

**S.1088, THE STREAMLINED PROCEDURES ACT OF 2005**

**NOVEMBER 16, 2005**

Mr. Chairman and Members of the Committee:

I am Eric M. Freedman, the Maurice A. Deane Professor of Constitutional Law at the Hofstra Law School. I am submitting this statement on behalf of the American Bar Association (ABA) and its more than 400,000 members at the request of its President, Michael Greco, to express our views on the substitute version of S. 1088, the "Streamlined Procedures Act of 2005" introduced by Senator Specter on October 6, 2005.

On June 28, 2005 then-President Robert Gray wrote you to express our deep concerns with this legislation and urge that its consequences be fully considered. As the Reporter for the ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2d ed., 2003) and a member of the Steering Committee of the ABA's Death Penalty Representation Project, I submitted a statement in connection with the hearings that were held on July 13, 2005 detailing the ABA's opposition to S. 1088 as then proposed. Following the Committee's adoption of Senator Specter's first substitute, Robert D. Evans, the Director of the ABA Governmental Affairs Office, wrote the Committee on September 27, 2005 to reiterate the Association's opposition. (Copies of the materials mentioned in this paragraph are enclosed for your convenience).

While some of the most recent changes have resulted in minor improvements to S.1088, the legislation nonetheless still represents a significant setback for justice. The section-by-section analysis appended to this statement details our objections to the bill.

In July we summarized our position by stating:

The ABA is not opposed to the death penalty, but it is in favor of justice in capital and non-capital cases alike. The bedrock definition of justice in this context is that the legal system function reliably to punish the guilty and acquit the innocent. In considering the role that federal habeas corpus should play within a structure designed to achieve these results, the ABA has long recognized two central facts:

A. The government must provide competent counsel to indigent defendants at each and every phase of the criminal process. If it did, both speed and justice would be immeasurably improved. For so long as it does not, both are in peril.

B. Federal habeas corpus proceedings should be structured in such a way as to insure that meritorious claims – be they claims of innocence or of violations of the procedures mandated by the Constitution to insure fairness and accuracy – are heard on the merits rather than disappearing in a thicket of legalisms [because] there is a chilling risk that the life of an innocent defendant may be lost in that thicket.

S. 1088 attacks both of these core principles. [Footnotes omitted]

As with regard to S.1088 as originally introduced, the fundamental orientation of this bill continues to be "antithetical to what real reform would require." The proposed legislation remains certain to worsen "a system in which the federal habeas corpus courts spend an enormous percentage of the time dealing with such issues as exhaustion, procedural default, harmless error, retroactivity, and many others to the virtual exclusion of the question of whether

in any particular case the state turned square constitutional corners in obtaining the conviction and sentence under review." Such a system is one "that exalts form over substance," and that should be abolished rather than perpetuated. As we stated in July:

Speed and accuracy both will be impaired by the enactment of a bill that diverts the courts from the merits while inviting numerous challenges to the validity of its provisions, challenges that will have to be litigated just as the law under AEDPA is becoming relatively stable. Speed and accuracy both would be enhanced by reform proposals that center upon the provision of competent counsel and a judicial focus on the vindication of constitutional guarantees.

We urge that consideration of S. 1088 be dropped and that Congress instead devote its attention to resolution of the truly critical issues that are today undermining the efficacy of habeas corpus in performing its historic charge of insuring that every criminal sentence meets the requirements of basic fairness mandated by the Constitution.

At minimum, in view of the costs that even the proponents of S. 1088 concede the justice system will have to bear if the bill is enacted, before the Congress decides to proceed along the lines of the proposal it should have empirical evidence of the existence of the problems the legislation claims to solve. As explicated in the enclosed section-by-section analysis, we conclude, based on the experience of our most knowledgeable members – who include prosecutors and judges as well as defense counsel – that many of the provisions of S. 1088 are in fact "solutions" in search of problems, what we previously described as "issues that, although troublesome to prosecutors in particular cases that they may have lost, are not systemwide problems." As you know this is also the unanimous view of the Chief Justices of the States, which are the purported beneficiaries of this legislation. But if proponents remain convinced there is controversy on this point, we would urge, as we did in our September 27 letter, that Congress authorize a study of the relevant issues by an appropriate independent body.

We thank you for your consideration of these views and reiterate our willingness to work with the Committee to assist it "in crafting legislation that its architects will be able to view with pride as a long-term improvement to our system of justice."

**Section-by-Section Analysis**

**Summary of concerns.** As with the prior versions, the substitute version of S. 1088 introduced on October 6, 2005 would virtually eliminate the ability of federal courts to determine federal issues in cases in which state prisoners (whether facing death sentences or serving prison terms) seek relief by means of habeas corpus. It would overrule numerous Supreme Court cases; increase the number of habeas corpus petitions; complicate and delay litigation; disregard long-established principles of federalism; and invite constitutional challenges to its impairment of the independence of the federal courts.

The essence of the constitutional difficulty with this bill is that it tells the federal courts to take jurisdiction of cases in order to decide whether previous state court judgments are valid, but then forbids those courts to decide questions of federal law that are crucial to reaching proper results. This combination denies the federal courts their Article III authority to decide cases within their jurisdiction in accordance with the Constitution (thus also violating the separation of powers), and may well constitute an unconstitutional suspension of the writ of habeas corpus

Even if not unconstitutional, the bill is unwise; by straitjacketing the traditional flexibility of the judicial branch to shape the habeas remedy in response to the circumstances of individual cases, the bill prevents judges from doing justice. At the same time, it would encourage the state courts to resolve cases on questionable grounds simply because the provisions of this bill would insulate such decisions from federal court review.

The legislation would further entangle the federal habeas corpus courts in procedural complexity and distract attention from what they should be deciding: the merits of federal constitutional claims. Many sections of this bill would strip federal courts of jurisdiction to decide federal issues. Those sections and others would raise serious constitutional question that would certainly generate protracted litigation. Numerous pending cases (particularly death penalty cases) would be held up while the courts resolve questions about the meaning of the new law.

Finally, some of these sections appear to address issues that, although troublesome to prosecutors in particular cases that they may have lost, are not systemwide problems. The prudent course with respect to questions whose seriousness is

subject to empirical study would be for Congress to direct that a study be conducted.

**SEC. 1:** This section states the bill's title as the "Streamlined Procedures Act of 2005." That implies that the bill would improve the efficiency of the habeas corpus process. But in application it would more probably frustrate streamlining efforts that have been under way in the courts for nearly a decade. Congress enacted a comprehensive reform program for habeas corpus in 1996. That program (AEDPA) contained numerous new provisions, many of which were ambiguous. Since then, federal courts, including the Supreme Court, have devoted extraordinary time and effort to deciphering those provisions in an attempt to make the system operate effectively. This bill would upset many of the decisions the Court has made to smooth out the wrinkles in AEDPA and introduce a host of additional provisions that, in turn, would require yet more time and effort to interpret.

**SEC. 2: (Exhaustion of Remedies)**

Existing law requires a prisoner to "exhaust" state court avenues for litigating a federal claim before he presents the claim to a federal court. The doctrine is a rule of timing. If a prisoner has not been to state court with his claim, a federal court will postpone action until the prisoner gives the state courts an opportunity to examine it. Then, however, the federal court will entertain the claim. This section would direct a federal court to dismiss an "unexhausted" claim "with prejudice." That means the claim would be cut off entirely; the federal court would not examine it even after the state courts have been consulted.

This section would overturn the Supreme Court's decision in *Rhines v. Weber*, which adopted the consensus of the circuits and allowed a federal district court to hold a habeas petition on its docket while a prisoner returned to present claims to state court. Proponents of the bill contend that it takes too long for prisoners to exhaust state remedies and that it would be more efficient simply to dismiss all claims that are not yet ready for federal adjudication. That would have made sense before AEDPA but as *Rhines* decision recognizes to adopt that procedure today would transform the "exhaustion" doctrine from a device that keeps federal courts from adjudicating claims before the state courts have had a chance to correct their own errors into an absolute prohibition on federal court consideration of federal claims – which is precisely what this section does. This would seem to be doubly inconsistent with basic principles of federalism: federal courts should defer to state courts when that is reasonably possible and adjudicate the merits when circumstances prove otherwise.

In its current form Section 2 provides two very narrow exceptions.

First, under subsection (B), to obtain merits review of an unexhausted claim, the prisoner must show not only "cause" for failing to exhaust state remedies, but also "a reasonable probability that, but for the alleged error, the fact finder would not have found that the applicant participated in the underlying offense" *and* that the denial of relief either would be "contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States", or that the denial of relief "would entail an unreasonable determination of a factual issue."

As elsewhere in the legislation, the first part of this exception simply ignores the well-documented testimony of Barry Scheck, Seth Waxman and others to the effect that in most actual cases it is impossible to demonstrate innocence until the effects of the underlying procedural defect (e.g. ineffective assistance of counsel, prosecutorial misconduct) have first been removed. The second part borrows language from AEDPA that occurs there in a completely different context. There, it describes federal review of claims that the state courts have adjudicated on the merits; here, there has been no state court adjudication, but the federal courts are being restricted in their review as though there had been.

Second, under Subsection (C), to obtain merits review, a prisoner must show that "but for the alleged error, it is more likely than not that no reasonable fact finder would have found that the applicant participated in the underlying offense" *and* that the denial of relief either would be "contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or that the denial of relief "would entail an unreasonable determination of a factual issue."

This second exception differs from the first in that it would suspend the general rule requiring dismissal with prejudice if the prisoner makes an even more powerful showing of actual innocence. It sets the bar so high that it would be practically impossible for anyone to clear it.

**SEC. 3: (Amendments)**

This section would allow prisoners to amend habeas corpus petitions only once and then only if they act before the state files its answer. It would not allow prisoners to add new claims, unless they meet the standards that Section 2 employs to govern federal court consideration of "unexhausted" claims.

Under Rule 15 of the Federal Rules of Civil Procedure, an amendment "relates back" to the time of the original complaint. The drafters are intent upon preventing prisoners from extending the one-year filing period by adding new claims by amendment more than a year later and relying on Rule 15's "relation back" feature to argue that the new claims are timely. In its recent decision in *Mayle v. Felix,* however, the Supreme Court held that amendments to habeas petitions usually do not "relate back." Accordingly, the problem Section 3 is meant to address (if it ever existed at all) has already been fully remedied by the Supreme Court.

This section is premature at best and unfair at worst. First, without regard for any applicable filing deadline, it permits the government to cut off the ability to amend simply by filing an answer. Second, while this section allows certain exceptions from the general restrictions it would place on amendments, those exceptions are the same highly-restrictive standards used in Section 2 to govern the treatment of "unexhausted" claims rather than the nuanced ones that the Court has just adopted in *Felix*.

**SEC. 4: (Procedural Default)**

This section, whose impenetrable drafting is certain to spawn years of hyper-technical litigation having nothing in the least to do with the fairness of the underlying conviction, would strip federal courts of jurisdiction to consider a claim that a state court previously refused to entertain on the basis of some procedural error committed by the prisoner or his lawyer in state court—for example, a failure to raise the claim at the time prescribed by state procedural rules. A federal court would have to accept at face value a state court's decision that some state procedural rule established a procedural requirement, that the prisoner or his attorney failed to comply with that requirement, and that, in consequence, the state court declined to consider the prisoner's federal claim.

The two narrow exceptions that generally track the standards used in Section 2 regarding "unexhausted" claims, then adds two further possibilities: the state may waive reliance on Section 4 to foreclose federal adjudication of a claim, and a prisoner is forgiven for failing to comply with a state procedural rule that the Supreme Court has previously determined not to "afford a reasonable opportunity" to present a federal claim in state court. The latter provision is simply illusory. It is triggered only by an existing decision by the Supreme Court that a particular state procedural rule is inadequate to cut off federal review of a federal claim. That being so, it is of no use to anyone; any prisoner who seeks to invoke it will be frustrated for want of a *previous* Supreme Court decision.

Turning federalism upside-down, this section also requires a federal court to enforce state procedural rules even where the state court was willing to overlook violations in order to insure just results on the merits.

Finally, Section 4 would overrule the Supreme Court's decision in *Artuz v. Bennett*, which resolved a question about the filing period for federal habeas corpus petitions. Under the AEDPA, a prisoner has one year after his conviction is affirmed to file a federal petition. Within that year, the prisoner may press a federal claim in state postconviction proceedings in order to satisfy the "exhaustion" requirement. If that happens, the time during which his application is "properly filed" in state court does not count against the one-year filing period. Sometimes, a prisoner will make some procedural mistake in state court so that his application is not "properly filed" in a formal sense. Nonetheless, the state court may have authority to consider it anyway, and may actually do so. Federal courts struggled with what do in such cases until the decision in *Bennett*. Writing for a unanimous Court, Justice Scalia explained that a state application is "properly filed" if it is directed to the right court at the right time, notwithstanding that it may be subject to dismissal on procedural grounds. Otherwise, the federal courts in making the relatively mechanical determination of whether a federal filing was timely would become enmeshed in state law determinations.

In a further strange inversion of federalism, this section would also order the federal courts to enforce state procedural rules where the state courts would not. A federal court would be required to ignore a state court's willingness to entertain the prisoner's application, to make its own determination about whether that application met the formal requirements of state law, and, if the federal court decides that it did not, to charge the time the application was pending against the one-year filing period allowed for the prisoner's federal petition. In the end, the federal court might conclude that the prisoner missed the federal filing deadline, even though he spent the time precisely as he should have: presenting the claim to a state court that had the ability to entertain it.

Proponents of this section have contended that it codifies *Pace v. DiGuglielmo*, in which the Supreme Court held that an *untimely* application in state court is not "properly filed" and thus does not suspend the federal filing period. But this section goes much further; it would overturn the holding in *Bennett* that a *timely* state application *is* "properly filed" though it may be subject to dismissal on other procedural grounds.

**SEC. 5: (Tolling)**

First, this section would mandate that if an application for relief in state court is to suspend the filing period for a federal habeas corpus petition, it must plead alleged violations of the prisoner's *federal* rights. Under existing law, such a petition might contain only claims based on state law. If the state courts find a state-law claim meritorious and grant relief on that basis, there will be no need for federal courts to become involved at all. This section would frustrate that means of reducing the number of federal habeas petitions.

Second, this section would forbid federal courts to relax the one-year filing period on equitable grounds—even when there are extremely good explanations for prisoners' inability to get to federal court within one year. For example, a court might excuse prisoners in Louisiana from the deadline (for a reasonable period) on the obvious ground that in the aftermath of Hurricane Katrina there was no federal court where they could file their petitions. This section would needlessly eliminate the authority to do justice in an extremely narrow category of cases.

Third, this section would overrule yet another recent Supreme Court decision: *Carey v. Saffold*. Under the existing provision of AEDPA, the one-year period for filing a federal petition is suspended while a "properly filed" application for state relief is "pending." If a prisoner is unsuccessful before the lowest level state court, he usually can either seek appellate review of that court's decision or start afresh with an independent application in a higher state court. Either way, there is a gap between the date he formally leaves one court and the date he begins in the next. (For example, a prisoner whose postconviction petition is dismissed at the state trial level may have 30 days to file a notice of appeal). In *Saffold*, the Court held that so long as a prisoner proceeds according to state law (meeting all the filing deadlines the state itself may establish), the federal filing period is suspended from the date the prisoner first goes to a state court until the highest state court acts. This section, by contrast, would require a federal court to examine the state court records, compute any period of time (however brief) when a prisoner was not formally before some state court, and charge that time against the one-year federal filing period.

The current version of Section 5 apparently attempts to overrule *Saffold* only in cases arising from states that process applications for postconviction relief by means of a series of independent applications for an "original writ," like California. But it is far from clear that its reference to "original-writ" systems is sufficiently clear to achieve this result. For example, the Florida Supreme Court considers attacks on state court convictions by simultaneously adjudicating (a) an appeal from the result of a post-conviction attack filed pursuant to Fl. R. Cr. Pr. 3.850 and (b) an application for an

original writ of habeas corpus filed directly with that court.

**Sec. 6: (Application to pre-AEDPA cases)**

This section carries forward a section in the original bill that would make the provisions in AEDPA applicable to cases that were already pending on the date that Act became law. It would thereby overturn still another Supreme Court decision, *Lindh v. Murphy*, which construed AEDPA not to extend some of its key provisions to pending cases. The decision in *Lindh* not only respected Congress' wishes, but also eased the transition from prior law to the new AEDPA regime. Proponents of this bill argue that this section would only bring a few older cases into line with current law. Instead, it would stir up the very problems the Court defused. Extending AEDPA to those cases would invite arguments about whether Congress genuinely means to impose new legal consequences on events in the past and, if so, whether changing the rules of the game retroactively is constitutional. Both arguments would, of course, require yet more litigation to address.

**Sec. 7: (Appellate Time Limits)**

This section carries forward a provision in the original bill that would establish new timetables for federal courts to follow in processing appeals in habeas cases. AEDPA contains similar timetables—but only for death penalty cases and then only for cases arising from states that give something in return, i.e., counsel for indigents in state postconviction proceedings. This long and complicated section addresses no genuine problem and is in any event unenforceable as a practical matter.

Section 7 would also bar federal circuit courts from rehearing applications regarding second or successive habeas petitions. Under existing law, parties cannot petition circuit courts for rehearing, but courts can revisit applications on their own motion. The underlying problem is that courts have only thirty days to process applications of this kind. Since they cannot do so without neglecting all their other work they enter place-keeping orders and then return to applications after they have had time to reach a decision. Here again, the courts are already solving procedural problems, and this section of the bill would only frustrate those efforts.

**Sec. 8: (Opt-in)**

This section would carry forward provisions in the original bill that make dramatic, changes to the so-called "opt-in" feature of AEDPA. These alterations are

badly conceived and worse drafted.

Under current law, a state can trigger a special set of procedural rules for death penalty cases (rules that are advantageous to the state) if the state establishes an effective system for providing competent counsel to indigents in state postconviction proceedings. Federal courts determine whether a state's scheme for supplying counsel meets the statutory criteria. The idea is that a state *gets* something (advantageous procedural rules in federal court) in exchange for *doing* something (providing good lawyers to indigents in state proceedings). But, as we noted in our testimony of July 2005, "The sad truth is that the states have found it more to their interests to retain their current inadequate systems for the provision of counsel than to obtain the benefits of [opt-in]." Rather than responding by fixing the systems, S. 1088 responds by rewarding the states' intransigence.

First, states would no longer have to satisfy federal courts that their systems for providing counsel in state proceedings are adequate. The authority to approve state schemes would be transferred to the Attorney General. The Court of Appeals for the District of Columbia would have exclusive jurisdiction to review his decisions, but only for an extreme abuse of discretion. The Attorney General is the nation's chief *prosecutor* and thus is hardly an appropriate officer to decide whether a state has kept its part of the "opt in" bargain.

Second, Section 8 reproduces in opt-in cases many of the provisions that the original bill used in other sections. Those earlier provisions typically borrowed standards from yet another feature of existing law, § 2254(e)(2), which governs the availability of evidentiary hearings in federal court. The resulting standards are not only unjustifiably restrictive as a substantive matter but also extraordinarily confusing and certain to spawn interminable litigation over their meaning.

Third, this section makes additional changes in cases in which federal courts stay executions pending federal habeas proceedings. Under the 1994 decision in *McFarland v. Scott*, a district court need not wait until a death row prisoner actually files a formal habeas petition to stay his execution but can issue a stay at the time the prisoner files an application for appointed counsel. This section would terminate such stays automatically 60 days after the appointment of counsel. Thus, counsel would be diverted into litigating a further stay application rather than working on the merits of the case.

Fourth, this section establishes a priority for death penalty cases in which a stay has been issued (but only as against non-capital habeas cases) and directs every federal

court entertaining capital habeas cases to adopt a plan "to ensure that such cases are completed in the minimum amount of time that is consistent with due process." This is an example of a provision that is unnecessary at best and ill-conceived at worst. Until Congress has established the existence and cause of a problem, legislating to solve it hardly makes sense.

The section also contains provisions respecting DNA testing which, as Barry Scheck and his colleagues plan to advise the Committee in greater detail, are inconsistent with existing legislation and insufficient to vindicate meritorious claims of innocence. Section 13 is in the same category and we therefore do not comment on it separately.

**SEC. 9: (Clemency)**

This section would strip federal courts of jurisdiction to entertain federal claims arising in clemency and pardon cases. Its extremely broad language would overrule *Ohio Adult Parole Authority v. Woodard*, in which the Supreme Court held in a case brought under Section 1983 that an inmate was entitled to assert the claim that the clemency procedures of a particular state violate minimal standards of due process under the federal constitution. The only exception is that the Supreme Court may hear such cases on review from the highest courts of states – thereby reproducing the precise inefficiencies that led to the modern regime of federal habeas corpus in the first place. *See* Eric M. Freedman, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 138-39 (NYU Press paperback 2003).

**SEC. 10: (Funding Requests)**

This section would bar federal judges entertaining habeas petitions from handling requests for financial support from attorneys representing prisoners. It would shift that responsibility to other judges, an inefficiency that has led the Judicial Conference to oppose it. The section would also usually require the proceedings on such a request as well as the amounts allowed to be public. This is inconsistent with ABA Death Penalty Representation Guideline 4.1.B.2 and constitutes unjustifiable discrimination against prisoners who happen to be indigent.

**SEC 11: (Victims' Rights)**

This section would extend the essentials of the Crime Victims' Rights Act, applicable to federal criminal proceedings, to the entirely different context of habeas corpus cases. Whatever the merits of the underlying policy, the section attempts to

implement it by driving a square peg into a round hole and is therefore likely to satisfy no one.

**SEC. 12: (Certificates of Appealability)**

This technical correction made by this section would authorize district judges to allow prisoners to appeal in habeas corpus cases. It conforms to current practice and is not controversial.

**SEC. 14: (Effective Date)**

This section of the bill would make its provisions applicable to habeas corpus cases already pending. Like Section 6, this would provoke lawsuits over whether Congress genuinely intends to attach legal consequences to events in the past and, if so, whether the Constitution allows it. Section 14 recognizes the problems that would be created by making everything in the bill immediately applicable to pending cases and thus allows for exceptions that may be set out in the provisions to which they apply. The result is only more confusion. Since the default position is that everything applies to all cases, and since it is untenable to take that position with respect to many provisions, the drafters have necessarily had to write special "applicability" rules for various provisions scattered throughout the bill. Those special rules, in turn, only invite litigation over their meaning as well as raising the serious risk that the drafters may have forgotten to include one where they should have.

It would make far more sense to adopt just the opposite general default position in this section and then establish exceptions from that where desired. That method would at least have the benefit of making Congressional intent clear.

# The erosion of the Great Writ

## The Streamlined Procedures Act, now before Congress, is the latest attempt in an ongoing effort to cripple federal habeas jurisdiction.

March 18, 1963 may have been the high water mark for the writ of habeas corpus, the so-called Great Writ. On that day, the Supreme Court considered the habeas petitions of Clarence Earl Gideon and Charles Noia and, in *Gideon v. Wainwright* and *Fay v. Noia*, established important safeguards for indigent defendants and personal liberty. In *Noia*, the Court concluded that Mr. Noia's continued incarceration was an affront to the "conscience of a civilized society," when it was revealed that his confession—the sole bit of evidence against him—had been obtained by police brutality. Even more important, the Court, after a long review of the history of the Writ, concluded that "[o]ur survey discloses nothing to suggest that the Federal District Court lacked the power to order Noia discharged because of a procedural forfeiture he may have incurred under state law. On the contrary, the nature of the writ at common law, the language and purpose of the Act of February 5, 1867, and the course of decisions in this Court extending over nearly a century are wholly irreconcilable with such a limitation."

Since then, however, the courts and Congress have eroded the impact of the Great Writ, reducing it to a network of procedural hurdles for indigent defendants, frequently unaided by counsel, seeking to challenge the constitutionality of their convictions or sentences in federal court. And although *Gideon* sparked the "right to counsel revolution," and *Noia* hailed the Great Writ as the most important protection for personal liberty against intolerable government restraint, those pronouncements now languish in the recesses of memory. Dissenting in *Stone v. Powell*, Justice Brennan remarked in 1976 that "[t]he groundwork is being laid today for a drastic withdrawal of federal habeas jurisdiction," and his words proved prophetic; within two decades of that decision, the Court in a series of decisions rolled back federal habeas protections nearly to pre-*Noia* levels.

Congress, too, bears responsibility for the demise of this historic check on government overreaching. Less than 10 years after the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) created a statutory maze not conducive to habeas relief, another chillingly titled bill of the same tenor, the Streamlined Procedures Act (SPA), is currently wending its way through the legislative process.

Introduced in both the Senate and the House, the SPA goes even further than the AEDPA to destroy the Great Writ. It includes a provision that removes jurisdiction from federal courts to consider claims that a state court refuses to hear because of a procedural error. Even if the error is caused by a lawyer's inadequate assistance, as is sadly so often the case, a federal court cannot hear a procedurally defaulted claim.

The SPA also bars federal courts from hearing almost all claims by capital defendants that a sentencing error occurred so long as the U.S. attorney general, the country's *chief prosecutor*, certifies that a state's indigent defense system satisfies statutory standards. The legislation also limits judicial discretion, by requiring federal courts to dismiss with prejudice any claims that failed to exhaust state postconviction proceedings, irrespective of the merits of those claims. Even the SPA's so-called "innocence exception"—an exception narrower than a needle's eye—reveals much about its sponsors' intent to cripple federal habeas jurisdiction.

All of this comes despite the highly-publicized, rapidly-growing list of exonerations of the wrongly convicted. Like Clarence Earl Gideon and Charles Noia before them, many of those innocent persons owe their freedom to the availability of habeas relief. Yet, many of them would have been denied relief

**Editorials** are prepared by a committee of the American Judicature Society appointed by the chair of the board.

# Editorial

(continued from page 56)

under the SPA.

Not surprisingly, the bill has faced considerable resistance, although some of its opponents may be surprising. Critics include the Judicial Conference of the United States, former federal and state judges and prosecutors, the Rutherford Institute, and the American Conservative Union. Even state court judges, the very judges whose actions are challenged in habeas proceedings, have condemned the bill and urged Congress to consider instead "targeted methods [to] ameliorate . . . documented problems" rather than depriving "federal courts of their traditional jurisdiction . . ."

This statement by state court judges speaks volumes about the many flaws in our justice systems, many of which stem from our neglect of the legitimate needs of indigent defendants and will be exacerbated by this latest legislative assault on habeas. In today's legal landscape, more, rather than less, should be done to ensure that the courts fully and fairly study the merits of these cases. Those who share AJS' commitment to a fair system of justice should work to revive a forgotten promise to deliver a full measure of justice to all defendants, even the poorest among us.

That is exactly what the Supreme Court recognized more than 40 years ago.

**Arizona Daily Star**
EDITORIAL
July 9, 2005

The Star's view: At a time when the American public is growing more queasy about the death penalty, Arizona Sen. Jon Kyl wants to limit the appeals process.

Given recent revelations of an imperfect justice system that wrongfully sends people to death row, we find it incredible that Arizona Sen. Jon Kyl wants to put people to death faster.

Kyl, a Republican, has introduced the euphemistically named Streamlined Procedures Act of 2005 in the Senate. The bill would limit the number of times a defendant could have the case reviewed before execution. The legislation has been introduced in the House by Rep. Dan Lungren, R-Calif.

It is expected to win wide approval in the House, where supporters see the checks and balances in the process as a manipulation of the system. This legislation would speed up the execution process and allow Congress to tell constituents it is tough on crime.

Capital punishment is one of those cultural wedge issues on which opposing sides may never agree. Some see it as punishment for the ultimate crime. Others see no justice when punishment is as barbaric as the crime.

Yet we have to ask why, while at war fighting terrorism at home and abroad, our elected officials are reaching for the political margins to find issues that will divide the country.

In fact, there are plenty of reasons why this "get tough with the death penalty" proposal should be turned down. The most compelling is recent evidence that prosecutors have put innocent people on death row.

What's more, public opinion, slowly, is turning away from capital punishment. We have no doubt that the death penalty will become a thing of the past, along with such other historical artifacts as lynchings, slavery and witch hunts.

Even the U.S. Supreme Court has been chipping away at capital punishment. It once was acceptable to put to death retarded defendants. And until recently, it was acceptable for states to impose the death penalty on teenagers. Both are now widely accepted as wrong.

Advocates of the death penalty should ask themselves why the American people would want to restrict judicial oversight for only those on death row. At what point will lawmakers like Kyl and Lungren decide to write legislation to shortchange people convicted of other crimes?

We have learned over the past couple of years of waning death-penalty enthusiasm that prosecutorial zeal and resources are no match for overworked, inexperienced and often incompetent defense attorneys. Cases have been sent back to the trial courts, for example, where attorneys slept during the trials.

And prosecutors have gone to appeals courts asking to put to death a man whose sanity was determined by his medication. When off his medication, the man was insane. But when on, he was considered sane. The prosecutors wanted the judge to order the defendant forcibly medicated so he could be executed.

The legislation that Kyl and Lungren have introduced would serve to degrade an already imperfect method for putting people to death. They would deny appeals because the process takes too long. But time is exactly what is needed to make sure that if people are sent to their deaths, we are sure they are guilty. According to the Death Penalty Information Center, the average time on death row for defendants who were eventually acquitted was 9.3 years.

We wonder whether Americans really want legislation that chips away at a judicial process that is supposed to protect us all. Kyl and Lungren are going against changing public opinion on this issue. This is not a time to make it easier to put people to death. It is a time to end capital punishment altogether.

**Concord Monitor**
(Concord, NH)
EDITORIAL
July 17, 2005

## Steamrolled rights
### Don't Erode Ability to Appeal Death Sentences

There is a growing awareness in this country, given a growing number of exonerations based on DNA and other evidence, that it's too easy for innocent people to land on death row. These cases help explain why public support for the death penalty has been eroding.

The U.S. Supreme Court is increasingly alarmed by the quality of legal representation afforded defendants in capital cases, and some states are hesitant to apply the death penalty given mounting doubts about the level of error built into their judicial systems. So it's the opposite of logic to see some in Congress moving the other way, seeking to curtail the ability of federal courts to hear claims of an improper trial from defendants convicted in state court.

The Senate held a hearing on the ill-advised and Orwellian-sounding Streamlined Procedures Act. What this legislation and its House companion threaten to streamline is the execution or lifetime incarceration of the innocent.

The federal judiciary is the ultimate guarantor of Americans' constitutional rights, including the right to due process, and it's sad to see members of Congress eager to further limit federal oversight over flawed state proceedings.

The centerpiece of the legislation would eliminate the review of most claims for cases coming out of states that the U.S. Department of Justice has certified as providing defendants with competent counsel. Should we leave it up to Attorney General Alberto Gonzales, he of the torture memos, to pass judgment on the quality of representation given convicts in Texas? Sounds like a great idea if you are a state prosecutor annoyed at those pesky federal judges.

The measure may even be unconstitutional - it's for a federal court, not a federal prosecutor, to determine whether states are violating the U.S. Constitution.
To sell their "streamlining" law, its proponents are offering to leave the door to the federal courthouse ajar for defendants who can point to evidence of their actual innocence.

This is a cynical ploy. It's pretty hard to produce such evidence if your right to a competent lawyer has been denied, or if a prosecutor got someone to lie on the witness stand.

Exonerations of people wrongly convicted of a crime typically start with a finding that there was a procedural flaw in the case, and only subsequent fair hearings establish the truth. That's one reason Congress ought to stand up for the due process rights of all Americans.

(*Los Angeles Times* Reprint)

U.S. Senator John Cornyn (R-TX)
Before the Committee on the Judicary
Habeas Reform: The Streamlined Procedures Act
November 16, 2005

Thank you, Mr. Chairman, for scheduling today's hearing and for continuing to examine an issue of such great importance to our criminal justice system.

I come to this debate with the belief that, (as some have said) appeals of criminal cases should not take 8 or 9 years and 3 trips to the Supreme Court to finalize whether a person was properly convicted or not. Unnecessary, extended delays repeatedly harm victims and their families -- and these delays should not be tolerated.

The Judicial Conference of the United States (and others) has been very involved in this debate, as well they should be. I appreciate the letter the Judicial Conference sent to the Chairman expressing their opposition. I want to make a few important points about the information presented in this letter.

First, the Judicial Conference notes that not only are the ***number*** of pending federal capital habeas corpus petitions growing – but that it is also taking ***longer*** to dispose of these petitions. For instance, they note that state capital habeas corpus cases that have been pending for more than three years has doubled -- from 20.2 percent in 1998, to 46.2 percent at the end of 2004. Similarly, they note that the median time from filing to disposition of these petitions nearly doubled over the same time period -- from 13 months in 1998 to 25.3 months in 2004.

Additionally, their statistics show that, beginning in 2001, the number of state capital habeas corpus cases **terminated** in the courts of appeals **was lower** than **the number filed**. This, of course, resulted in an increase in the number of pending capital cases. From the end of 1998 to the end of 2004, these cases increased from 185 to 284.

And finally, this letter reveals that state capital habeas corpus appeals that were pending in the courts of appeals for three years or more increased from 5 ( or 2.7 percent of all pending state capital habeas cases) at the end of 1998 to 36 (or 12.7 percent of all pending state capital habeas corpus cases) at the end of 2004.

These statistics clearly reflect a ***distinct trend*** of increasing delays associated with the resolution of federal capital habeas corpus claims. Addressing these delays is within the purview of Congress and also within this Committee's jurisdiction. Chairman Specter has not avoided this responsibility -- he has instead demonstrated his determination to move forward. I appreciate his leadership on this important issue.

**The Denver Post**
EDITORIAL
August 9, 2005

# Justice right to worry about death penalty

## John Paul Stevens, addressing the American Bar Association, takes note of improper verdicts and urges caution on use of capital punishment.

U.S. Supreme Court Justice John Paul Stevens lashed out against the death penalty Saturday, on the heels of a vote by the Conference of Chief Justices of state courts to oppose a wrongheaded bill by Sen. Jon Kyl, R-Ariz., and Rep. Dan Lungren, R-Calif., that would put capital punishment into overdrive.

Stevens, addressing an American Bar Association meeting in Chicago, did not call for abolition of the death penalty. But he lamented the impending departure of Sandra Day O'Connor, whose vote helped restrict the death penalty for mentally retarded defendants and those whose crimes were committed before their 18th birthday.

Stevens told ABA delegates that the jury selection process, by screening out potential jurors opposed to capital punishment, could bias the system toward convictions. He also warned jurors might be improperly swayed by victim-impact statements.

Stevens' speech was particularly timely in view of the efforts by Kyl and Lungren to stop what they call "endless delays" between convictions in capital cases and executions. Congress passed a measure in 1996 to streamline death penalty procedures, but Kyl and Lungren want an even faster rush to judgment. Yet, according to the Death Penalty Information Center, more than three dozen death-row inmates have been exonerated since 2000. Surely, even advocates of capital punishment should be concerned that they not execute the innocent.

While not a capital case, the recent freeing of Luis Diaz, who spent 25 years in prison for a series of rapes that DNA evidence now proves he didn't commit, underscores the need to make the most exacting scientific evidence available in all cases involving possible death penalties.

The Post also shares the concern voiced by Justices O'Connor and Ruth Bader Ginsburg about the poor quality of legal representation in many death penalty cases. Some states, including Colorado, field well-qualified public defender teams in capital cases. But too many states, particularly in the Southern "death belt," appoint underpaid, often inexperienced lawyers.

President Bush's nominee to replace O'Connor, John G. Roberts Jr., has a limited record on the death penalty. While serving in the Reagan White House, Roberts suggested that the high court could cut its caseload by "abdicating the role of fourth or fifth guesser in death penalty cases." Yet, Roberts later did volunteer legal work for a death row inmate.

If he does reach the high tribunal, we hope Roberts takes a responsible view of the death penalty, not the "execute first and ask questions later" tack advocated by Kyl and Lungren.

**Detroit Free Press**
EDITORIAL
July 19, 2005

## Limits on Appeals

DNA and other post-conviction exonerations have exposed ugly cracks in the criminal justice system. Most people now know innocent people wind up in prison and even sentenced to death.

The appeals process serves as a safeguard, but that safety net will be all but shredded if Congress approves bills that would severely limit federal oversight over flawed convictions in state courts.

The Streamlined Procedures Act, sponsored by Sen. John Kyl, R-Ariz., in the Senate, and Rep. Dan Lungren, R-Calif., in the House, would prevent federal review of capital cases from states that the U.S. Department of Justice has certified as providing competent defense counsel. In effect, it would leave it to federal prosecutors, instead of the federal courts, to determine whether states are violating the U.S. Constitution.

The bill would still allow certain appeals if there is evidence of innocence, but that means almost nothing. Exonerations often start by exposing a procedural flaw in the case, such as an incompetent defense lawyer, jury bias or a prosecutor withholding evidence, before establishing the truth with further investigation.

Equally onerous, the bills would prevent inmates from seeking federal review of constitutional issues not brought up on initial appeals because of ineffective counsel. East Lansing Attorney F. Martin Tieber, former deputy director of the State Appellate Defender Office, said the proposal would affect most Michigan inmates with lengthy sentences, especially the poor, who often don't get adequate legal counsel but couldn't appeal serious due process violations later in federal court.

When mounting evidence shows a disquieting number of innocent people are in prison or on death row, Congress ought not make it harder for the wrongfully convicted to get justice.

United States Senate
Committee on the Judiciary
Hon. Arlen Specter, Chairman

# Hearing on Habeas Reform: the Streamlined Procedures Act of 2005

*November 16, 2005*

Testimony of
Ronald Eisenberg
Deputy District Attorney
Philadelphia, Pennsylvania

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify before you today.

I have served as a prosecutor for 24 years. I am the supervisor of the Law Division of the Philadelphia District Attorney's Office, a group of 60 lawyers. Many of those lawyers handle regular appeals in the Pennsylvania appellate courts. But more and more of our attorneys must devote themselves full time to federal habeas corpus litigation. In the last decade, the number of lawyers employed exclusively on habeas work has increased 400%. Despite the limits supposedly imposed by law, the only certain limit on the federal habeas process as it is currently administered is the expiration of the defendant's sentence.

But that leaves ample opportunity and motivation for litigation, because the cases that reach federal habeas review involve the most dangerous criminals who receive the most serious sentences – not just death penalties, but non-capital murders, rape, violent robberies and burglaries, brutal beatings and shootings.

Too often, discussion of the proper scope of federal habeas corpus review is really just a debate about the value of the death penalty, and the justness of imprisonment and punishment generally. To be sure, many federal courts seem flatly unwilling to affirm capital sentences. In Pennsylvania, for example, almost every single contested death sentence litigated on habeas – over 20 cases in the last decade – has been thrown out by federal judges; only one has been upheld.

But the primary problem is one of process, not results. The truth is that, whether or not they end up reversing a conviction, federal habeas courts drag out

litigation for years of utterly unjustifiable delay, creating exorbitant costs for the state and endless pain for the victims.

**Nationwide obstruction**

I am aware of the view that the federal habeas corpus review process is not in need of reform, that the problems, if any, are localized in jurisdictions such as the 9th Circuit Court of Appeals. Of course the 9th Circuit is quite a large locality, certainly worthy of Congressional attention in and of itself. But it is by no means unique when it comes to the gyrations imposed by current federal habeas corpus practice.

My experience has all been in the 3rd Circuit, where we face almost exactly the same issues as my colleagues in states such as Arizona and California. I also serve on the board of a national capital prosecutors organization and I meet regularly with lawyers from all over the country. We're all fighting the same habeas battles – over procedural default and exhaustion and filing deadlines and certificates of appealability and a dozen other habeas concepts that ought to be straightforwardly resolved but seldom are.

In a recent case from my office before the Supreme Court, for example, the question concerned the statutory section providing that the habeas time bar can be tolled by a state court filing only where that filing was considered "proper." Most of the authority against our position came not just from the 9th, but from the 5th and 11th Circuits. Those courts had held that federal judges were free to make their own judgments about whether state court filings were proper, and

they had devised increasingly complex legal standards for doing so. But for the fortuitous grant of certiorari, states throughout the South and West would still be struggling to apply these judge-made standards in habeas cases that should have been over and done with under the statute.

Of course, most habeas questions never reach the Supreme Court. When circuit court decisions gum up the habeas statute, we are generally stuck with them.

**Capital and non-capital quagmire**

Another argument against habeas reform is that, to the extent problems exist in the administration of the statute, they are limited to the litigation of capital cases. That again is not my experience. To be sure, capital habeas litigation consumes a hugely disproportionate share of habeas resources, and it is the engine that drives the development of convoluted, circuitous application of the habeas statute. Once these extra-statutory interpretations are developed, however, they cannot be confined to the capital context.

So, for example, federal judges invented the "stay and abey" procedure to allow defendants to get their foot in the door in federal court while returning to state court in an effort to litigate new claims that were not properly raised previously. "Stay and abey" permits circumvention of both the habeas exhaustion requirement and the one-year habeas filing deadline. The practice was originally devised for eve-of-execution cases. The Supreme Court has recently attempted to place some limitation on "stay and abey." Now that the

procedure exists, however, it cannot be restricted to capital cases. Any defendant, capital or non-, is free to engage in such stay litigation; and if he is successful he can put his habeas petition on hold indefinitely while he files yet another appeal (usually, this will be at least his *third* appeal) in state court.

**Post-AEDPA problems**

Of the usual arguments against habeas reform, perhaps the most ironic is that we don't need any more, because AEDPA – with the help of federal judges – has now fixed everything. The reasoning goes that AEDPA, when it was originally enacted, disrupted settled habeas law, and required years for the courts to reestablish the status quo. Now that the statute has been "shaken out," the law is stable again, and habeas litigation will move along swimmingly – unless new reform unwisely upsets the apple cart one more time.

What matters most, however, is *how* questions under AEDPA are resolved – not how long it takes to resolve them. Take, for example, the doctrine of "equitable tolling." In AEDPA Congress created a one-year filing deadline for habeas petitions, with various exceptions spelled out specifically in the statute. Contrary to statutory construction rules, the federal courts then decided that they could create their own exceptions to the statutory bar, as "equity" moved them to do so. Every circuit has accepted this general principle; the matter is as settled as most habeas questions can be.

But it would be cynical fiction to suggest that equitable tolling has therefore streamlined habeas corpus review. Just the opposite is true. There is

absolutely no certainty in application of what was intended as a clear-cut deadline, because at any moment the court might decide to invent a new equitable tolling exception. Even worse, these new exceptions often require extensive factual inquiry in individual cases. A whole cottage industry of equitable tolling evidentiary hearings has been born. Thus was the time bar transformed from a limitation on litigation into an invitation to litigate.

AEDPA jurisprudence reveals many similar developments. They were *in reaction to*, not in explication of, the new statute. In addition to the "stay and abey," "proper filing," and "equitable tolling" issues discussed above, we have seen, for example, the growth of "inadequacy" review to undermine procedural default, the indulgence of excessive litigation on certificates of appealability, and the use of "claim-splitting" and other means of avoiding the statutory deference requirement.

Congress is not somehow stuck with such misapplication of its original habeas reform effort. Further legislation is appropriate.

**The state chief justices**

In recent months, much has been made of a resolution passed by the association of state court chief justices, which calls for delay of any additional reform to the federal habeas system.

It is unclear whether such a resolution is representative of the views of state judges generally, not to mention those of the executive officials who actually have the duty to defend state criminal judgments. It is fair to say,

however, that state judges are, by definition, not experts on the intricacies of federal habeas corpus practice. The resolution does not purport to assess the wisdom of modifying the cause and prejudice standard, for example, or of any other provision of the Streamlined Procedures Act. It would be anomalous to defer to the non-specific views of unspecified state judges on the need for federal habeas reform when so many federal judges are so unwilling to give deference to the actual work product of our state court systems.

**The Administrative Office of United States Courts**

Opponents of habeas reform have also taken refuge recently in the position of the administrative arm of the federal courts. But it is hardly surprising if federal judges do not appreciate the prospect of further limitations on their power. No one likes limitations on their own power; that is why we have a government of checks and balances.

To the extent the Administrative Office professes an objective basis for its policy preferences, the numbers just don't add up. The AO has released statistics purporting to show that the federal courts are disposing of habeas petitions as fast as they are filed, and therefore that there is no such thing as undue habeas delay under AEDPA.

But the AO's own data appear to contradict this claim. Over the last six years, the time to dispose of a capital case has increased by half in the circuit courts, and has nearly *doubled* in the district courts.[1] The Administrative Office

[1] The median time from filing in district court to disposition for state capital habeas corpus cases was 13 months in 1998 and rose by 2004 to 25.3 months. The

points with apparent pride to its claim that disposition time for *non*-capital cases has remained relatively constant.[2] But under AEDPA there can be no justification for such a growing disparity between capital and non-capital disposition rates. According to the federal courts, not one state has qualified for special treatment of its capital habeas cases; thus there is no legal difference in the procedures for handling capital and non-capital cases. Disposition rates should have risen or fallen in conjunction.

But there is a more important point: *AEDPA was supposed to speed things up.* Significant new provisions like the time bar, if honestly applied, should have *reduced* disposition times, *especially* for non-capital cases. If, as the Administrative Office says, we are seeing at best a holding action for non-capital cases, and for capital cases a significant slowdown, then there can be no clearer proof that habeas reform, as interpreted by the federal courts, has not succeeded.

**Some continuing roadblocks to reform**

The Streamlined Procedures Act as originally formulated was an important step forward for the victims of crime who suffer through the endless relitigation of their cases. The version of the legislation currently before the Committee still contains many positive provisions and will have meaningful impact. Some problem areas, however, were not addressed in the original bill or were subject to

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median time from filing of notice of the appeal to disposition for state capital habeas corpus appeals was 10 months in 1998 and rose by 2004 to 15 months. Explanation of Views: Positions Adopted by the Judicial Conference of the United States on September 20, 2005, Regarding the "Streamlined Procedures Act of 2005, pp. 2-3

[2] *Id.* at 2

changes in later revisions that may undermine the habeas reform effort. For example:

- The SPA originally limited review of state court **harmless error** determinations. That provision is now gone from S. 1088. As a result, even after adoption of SPA we would continue to see quibbling by federal courts about inherently factual, intensively record-based judgments concerning the weight of evidence presented in support of state court convictions. Yet federal judges possess no special insight into the minds of state court juries. On the contrary, at so far a remove they can be expected to have if anything less ability to engage in such second-guessing of the fact finder. The abandonment of this provision is a setback for victims of state crimes.

- The bill in both original and current form places **time limits on appellate habeas decisions**. Delay in this area is endemic and a correction is long overdue. As formulated, however, the provision may be of small use, because the time limits run only from the filing of appellate briefs. In reality, much of the delay occurs even *before* briefs are filed, while appellate courts spend inordinate time on preliminary matters such as motions to grant or expand certificates of appealability. In my jurisdiction, for example, a habeas decision cross-appealed by both parties has been sitting for four years, and to date the court has not even issued a briefing schedule. Effective appellate time limits must be reformulated to address such periods of delay, especially with respect to certificates of appealability.

- The SPA commendably attempts to remove delays arising from interpretations of § 2244(d)(2) of the habeas statute, concerning tolling for **"properly filed" state post-conviction petitions**. In its current language, however, the legislation would amend the existing reference in (d)(2) to state court "judgments or claims." This change could unintentionally jeopardize a recent ruling making clear that state post-conviction petitions ar not properly filed, and do not toll the federal habeas deadline, unless they are timely. That would be a setback in the effort to expedite federal habeas litigation.

- The substitute bill before the committee contains new provisions creating an independent federal statutory right to **DNA testing**, not just for capital cases qualifying for special review under Chapter 154, but for all state convictions generally. The impulse to protect innocence is a commendable one. But even before Congress first began debating the issue in relation to its "Innocence Protection Act," the states had already been acting on that impulse. Virtually every state now has its own post-conviction DNA testing procedures. The new federal DNA provision would completely preempt the states' efforts, rendering their statutes null and void for federal habeas corpus purposes. It would be the ultimate irony if this bill -- which is ostensibly designed to assist victims and respect state court judgments -- in fact throws out state court testing decisions automatically, and requires victims to relive the incredible strain of yet another post-conviction challenge to their credibility.

- The original SPA appropriately made its provisions applicable to pending cases. The current version substitutes a maze of effective dates that vary

section by section. All of these new effective dates, however, will substantially postpone the benefits of the legislation -- in some cases for many years. Given the glacial pace of federal habeas determinations, it is again ironic that a bill intended to fight delay will instead sanction such delay for at least one more generation -- perhaps half a decade -- of habeas litigation.

There is an inherent imbalance in the exercise of federal habeas review over state criminal convictions. Federal habeas courts have great power, simply because they are last in line. But they have little responsibility, because they are so far removed in time and space from the circumstances of the crime and the subtleties of the state proceedings. Accordingly, they have small motive to act expeditiously or efficiently, to give credit to the judgments of their brethren in state courts, or to consider the needs of crime victims.

The only way that balance can be restored is by Congressional statute. I respectfully urge the Committee to endorse such legislation.

Thank you.

**FEDERAL PUBLIC DEFENDER**
**Western District of Washington**

*Thomas W. Hillier, II*
*Federal Public Defender*

November 10, 2005

Honorable Arlen Specter
Chairman
Senate Judiciary Committee
711 Hart Senate Office Building
Washington, DC 20510

Honorable Patrick J. Leahy
Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Streamlined Procedures Act of 2005 (S. 1088): Substitute Introduced October 6, 2005

Dear Chairman Specter and Senator Leahy:

I write on behalf of the Federal Public and Community Defenders to strongly oppose the substitute version of S. 1088 introduced by Senator Specter on October 6, 2005. I wrote regarding prior versions of this legislation on July 8 and September 21, 2005, and appreciate the invitation to comment on this version. Attached to this letter is our September 21, 2005 letter regarding the last version (Exhibit A), an analysis of each section of the substitute introduced on October 6, 2005 (Exhibit B), and examples of cases illustrating the disastrous impact the substitute would have, including execution and life imprisonment of the innocent (Exhibit C).

The current substitute would not correct egregious violations of constitutional rights that deny the possibility of any confidence in the results, and would facilitate the execution and incarceration of the innocent. It would permit state actors to commit or ignore constitutional violations, which themselves are often the cause of a failure to exhaust, procedural default, or need to amend, by virtue of which the constitutional claim would be subject to an insurmountable innocence hurdle, thus precluding federal review. The result would be to encourage state misconduct, failure to provide adequate counsel, and abdication by state courts of their own responsibilities, and to permit unreliable convictions and death sentences to stand.

In granting the writ based on constitutional errors in the capital murder trial and sentencing of Keith Williamson, the federal district court judge said:

> While considering my decision in this case I told a friend, a layman, I believed the facts and law dictated that I must grant a new trial to a defendant who had been convicted and sentenced to death.
> My friend asked, "Is he a murderer?"
> I replied simply, "We won't know until he receives a fair trial."

> God help us, if ever in this great country we turn our heads while people who have not had fair trials are executed. That almost happened in this case.

Williamson v. Reynolds, 904 F.Supp.2d 1529, 1576-77 (E.D. Okl. 1995). After the grant of habeas relief and remand for a new trial, Mr. Williamson proved through DNA testing that he and Dennis Fritz were innocent and that the State's chief witness was guilty.

The function of habeas corpus is to ensure that no one is convicted or sentenced in state proceedings that violate federal constitutional standards designed to ensure fundamental fairness and accuracy, and also to act as an incentive to the states to conduct their proceedings consistent with those standards. It is the application of those standards *at trial and sentencing* that is designed to ensure fairness and accuracy. The substitute would make habeas corpus itself the vehicle for determining whether a prisoner is guilty, but without the tools for an accurate resolution, and according to an expanded definition of guilt that even the actually innocent could not overcome. Our analysis of the principal failings of the substitute is summarized as follows.

***Sections 2-5 would allow the incarceration and execution of the innocent, would not recognize egregious violations of constitutional rights that undermine confidence in convictions and death sentences, would allow convictions and sentences obtained in proceedings infected with purposeful race discrimination to stand, and would encourage state actors to commit or ignore violations of constitutional rights.***

In order to consider an unexhausted, procedurally defaulted, or added or amended claim, the court would have to first find a probability or likelihood of innocence of participation in the offense *and* that denial of relief would be contrary to or an unreasonable application of Supreme Court law, or an unreasonable determination of a factual matter. In many cases, the evidence that would support such findings was not developed in state court precisely because the prisoner was thwarted in doing so by the state hiding the evidence, ineffective assistance of counsel in failing to discover or present it, or an arbitrary state court ruling refusing to consider the claim or to admit the evidence. Because the innocence plus merits exceptions do not provide for evidentiary development to aid the court in making such fact-bound determinations, and indeed the court would be stripped of jurisdiction to order any evidentiary development under Sec. 4, the relevant evidence could never be heard, and a favorable finding could not be made. While the intent may have been to permit review more easily if there was "cause," the requirement of a showing of a reasonable probability of innocence of participation plus success on the merits could never be met, thus making "cause" irrelevant.

Furthermore, the constitutional claim may not involve evidence of innocence at all, though the person is in fact innocent, as demonstrated in the cases of Ernest Willis and Nicholas Yarris. The factual bases for Mr. Willis' claims were that the State had administered antipsychotic drugs to him without his consent, and that the State had withheld a psychologist's report stating that he did not meet the future dangerousness requirement for eligibility for the death penalty under Texas law, neither of which would

have led a fact finder to believe he did not participate in the offense, but the District Attorney has since dismissed all charges against Mr. Willis, declared him to be actually innocent, and apologized to him and his family on behalf of the state of Texas. Mr. Yarris' claims were based on mental health issues and improper instructions at the penalty phase, which would not have led a fact finder to believe he did not participate in the offense, but he has since established his innocence beyond a doubt through DNA testing.

Moreover, requiring a showing that the fact finder probably or likely would not have found that the petitioner "*participated* in the underlying offense" would drastically alter the bedrock principle that proof of *guilt of the offense* marks the legal boundary between guilt and innocence. The result would be that in cases where a confession, eyewitness testimony, or other apparently strong evidence of guilt was introduced, the prisoner would be executed or remain incarcerated, and never have a chance to show that the evidence was false or inaccurate. Prisoners who participated in some way, but could not be found guilty of the offense of conviction, but only of a lesser included offense or no offense at all, would nonetheless be executed or remain incarcerated for the full term imposed. The State would be permitted to try a defendant on one theory, then later, when it was clear that the defendant was not guilty under that theory, claim that the defendant still somehow "participated," and keep him in prison or execute him on a theory unsupported by any evidence and never tried to a jury.

The substitute would allow purposeful race discrimination in jury selection because such claims do not rely on evidence of lack of "participation in the underlying offense." Convictions and sentences obtained in proceedings infected with blatant race discrimination would be allowed to stand.

Contrary to decades of Supreme Court law holding that a death sentence must be reliable, the substitute would preclude consideration of sentencing claims. It is unconstitutional and repugnant to the values of a civilized society to execute every person who is guilty even of the serious crime of murder. Instead, the aggravating circumstances must outweigh the mitigating circumstances, and the states have their own requirements as to who is even eligible for the death penalty. The appropriate punishment cannot be reliably determined if the jury did not hear significant mitigating evidence due to grossly ineffective assistance of counsel, or heard false or inaccurate aggravating circumstances.

The exception to procedural default if "the United States Supreme Court has determined that the particular State procedural rule does not afford a reasonable opportunity to present the Federal claim" would apply to no one. The state courts would be free to "find" a procedural bar based on a "rule" never announced before it was allegedly violated, or with which it would have been impossible to comply, or that was applied against the petitioner but not against others similarly situated.

Sec. 5, while improved, still raises significant concerns, in that it would preclude equitable tolling for reasons beyond the petitioner's control, statutory tolling if the state petition did not include a "Federal constitutional claim," and statutory tolling while

moving from one state court to another in states with an "original writ system," no matter how diligently.

The substitute would create perverse and dangerous incentives for the states. Simply by hiding the evidence throughout state court proceedings,[1] by appointing incompetent counsel at trial, on direct appeal, or in post-conviction,[2] or by arbitrarily refusing to hear the claim or admit the relevant evidence,[3] state officials and courts could cause a failure to exhaust, a procedural default, or a need to amend the federal petition. Such claims (even if "cause" were found) would then be subject to the heightened innocence of participation plus success on the merits determination without evidentiary development, before they could be considered on the merits, which would prevent all federal review of sentencing claims, race discrimination claims, and, as a practical matter, nearly any claim.

***Sec. 8, rather than recognizing that the states have chosen not to provide a system for and actual appointment of competent counsel, and attempting to stimulate improvement, would reward the states for not doing so.***

First, states would no longer have to satisfy the neutral federal courts that their systems for providing counsel in state post-conviction proceedings are adequate. Sec. 8(d) would take the decision as to whether and when a State has successfully opted in from the Article III court with jurisdiction over the state, and place it in the hands of the Attorney General, an Executive Branch official who routinely submits *amicus* briefs supporting the states and opposing state prisoners in federal habeas corpus proceedings, thus creating the potential for and appearance of bias.

Sec. 8 appears to stem from claims by prosecutors that judges are denying certification to states that try in good faith to attain it, and thus it follows that judges should be displaced by the Attorney General. Even if the premise were accurate, the proposed cure of transferring a *judicial function* to the Attorney General of the United States, in a matter that, moreover, has nothing to do with *any* function of the Attorney General of the United States, would be an unconstitutional violation of separation of powers.

Moreover, the premise appears to be false. No state has yet complied with the existing statute. In some cases soon after AEDPA, the states did not have or claim to have the required mechanism, and have made no subsequent attempts. Pennsylvania is one example, though, according to a representative of the Philadelphia District Attorney's

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[1] Banks v. Dretke, 540 U.S. 668 (2004).

[2] Jermyn v. Horn, 266 F.3d 257 (3d Cir. 2001); Lee v. Norris, 354 F.3d 846 (8th Cir. 2004).

[3] Soffar v. Dretke, 368 F.3d 441, 478-79 (5th Cir. 2004).

Office, the system is "rigged."[4] Soon after the AEDPA, Pennsylvania death row inmates, not having been able to ascertain what set of deadlines they needed to comply with, filed a class action lawsuit asking the court to order the State to declare whether it was an opt-in state. The result was that the State declared that it did not meet the statutory requirements, and the Third Circuit agreed. Death Row Prisoners of Pennsylvania, 106 F.3d 35 (3d Cir. 1997). Since then, Pennsylvania has never claimed that it meets the opt-in requirements. The system is hardly "rigged."

More disturbing, some states have sought to take advantage of the short deadlines and special deference reserved for opt-in states without having complied with their obligations under the statute. In Spears v. Stewart, 283 F.3d 992 (9th Cir. 2001), the Ninth Circuit found that Arizona had a facially qualified mechanism. A necessary basis for that conclusion was that it had a rule requiring appointment of counsel within 15 days of the Arizona Supreme Court's issuance of notice of the mandate after denial of certiorari by the Supreme Court.[5] This rule was later repealed, and Arizona now has no requirement that counsel be appointed at any time.[6] Arizona did not follow its 15-day rule in the Spears case when the rule was in effect, instead appointing counsel *20 months* after the Supreme Court denied certiorari. Although Mr. Spears' lawyer was not even appointed until well past the opt-in filing deadline, Arizona sought to have the habeas petition that the lawyer filed, after he was appointed, time barred under that deadline. The Ninth Circuit appropriately found that Arizona had utterly failed to appoint counsel in a timely manner.[7] Similarly, in Bennett v. Angelone, 92 F.3d 1336 (4th Cir. 1996), Virginia argued that the special deference reserved for opt-in states should be applied to the state court's decision denying the petitioner's state post-conviction petition, even though Virginia had no system for appointment of post-conviction counsel until after the state court's decision was made and post-conviction proceedings were at an end, and even then did not provide for compensation or litigation expenses of appointed counsel. The Fourth Circuit concluded that "applying § 107 to Bennett's petition would upset the 'quid pro quo arrangement' the Act was supposed to establish."[8] And in Tucker v. Catoe, 221 F.3d 600 (4th Cir. 2000), South Carolina appointed counsel the State admitted was not qualified under its own standards, then argued that the petition should be time-barred under the opt-in provisions. Again, the Fourth Circuit concluded that "[b]ecause

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[4] According to Thomas Dolgenos of the Philadelphia District Attorney's Office the current system is "sort of rigged. We're not sure if we're ever going to get compliance. A lot of states thought they should now be in compliance. They've taken steps but can't convince the circuits of that." See Marcia Coyle, More Fuel on Fire Over Federal Habeas Bill, National Law Journal at 1 (Mar. 17, 2005).

[5] Id. at 1012, 1016-18.

[6] Id. at 1000-01.

[7] Id. at 1019.

[8] Id. at 1342.

Virginia's mechanism had not actually been applied to the petitioner, the Commonwealth could not invoke the capital-specific provisions of AEDPA."[9]

Second, Sec. 8 would explicitly permit the retroactive certification that the courts have rebuffed. It would allow states to appoint counsel past the deadline under 28 U.S.C. § 2263, obtain certification with an "effective date" on or before the date counsel was appointed, then obtain a ruling that the petition is time-barred.

Third, Sec. 8(c) would change a tolling provision included in the prior substitute in a manner that would allow the States to cause the filing deadline to run without appointing counsel, by changing the word "appoint" to "offer." Under this revision, any time the State took to actually appoint counsel after the "offer" would not toll the time requirements. This would permit states to totally defeat federal review by waiting to appoint counsel until after the short deadline had passed, and then claim that the petition was time-barred.

Fourth, Sec. 8(a) would reproduce in capital cases from opt-in states the same provisions in previous versions applicable in all cases pertaining to unexhausted claims, amended or modified claims, claims found by a state court to be procedurally barred, claims denied on the merits and on the basis of a procedural bar, and claims reviewed on the merits under a heightened standard of review. To obtain review of such a claim, the petitioner would be required to establish that the claim "would qualify for consideration on the grounds that" the "facts underlying the claim" would "be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense," *and* that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence."

Again, in many cases, evidence of innocence does not emerge until the federal court appoints counsel, orders discovery, and holds an evidentiary hearing. The reason for this frequently is state misconduct in hiding the evidence, ineffective assistance of counsel in failing to discover or present it, or an arbitrary state court ruling ignoring or excluding it. As with the exceptions in Secs. 2-4, those who were prevented from developing evidence of innocence in state court through no fault of their own could not meet this standard upon arrival in federal court. Even if the petitioner could meet the innocence standard, he would also have to show that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." In many cases, evidence of innocence *was* discovered previously but the state court ignored it, or it *could* have been discovered but counsel failed to do so, or it was *known* to counsel but counsel did nothing about it. In other cases, evidence of innocence *was* discovered and developed in state court and would, for that very reason, not meet the exception. And, of course, claims not involving innocence, including sentencing claims, would receive no federal review.

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[9] Id. at 604.

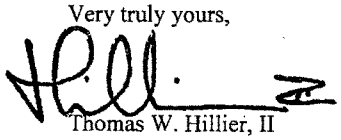
Under current law applicable to cases from opt-in states, the federal courts may review a claim, whether or not tied to innocence, that was not raised and decided on the merits by the state courts if the failure to properly raise the claim is the result of unconstitutional or unlawful state action, *or* is based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present it for state or federal post-conviction review. This wisely recognizes that even competent post-conviction counsel is powerless to prevent state misconduct or ineffective representation by former counsel. With no evidence to the contrary, this should not be changed.

Our concerns with respect to the provisions pertaining to DNA testing (Secs. 8, 13), retroactivity (Secs. 6, 14), clemency and pardon proceedings (Sec. 9), *ex parte* funding requests (Sec. 10), and crime victims rights (Sec. 11) remain largely unchanged and are discussed in detail in Exhibit B.

We again urge the Committee to scrap this proposal in favor of a true study of issues associated with federal court review of state convictions and sentences, with the ultimate goal of producing legislation that addresses the very real problems that produce unjust and unreliable results in some cases.

Thank you again for the opportunity to present our thoughts. We are available to provide further information, assistance or testimony at your request.

Very truly yours,



Thomas W. Hillier, II
Federal Public Defender
Chair, Legislative Expert Panel

cc: Members of the Senate Judiciary Committee

**Contact:** **Trevor Miller**
**(202) 224-8657**

# Statement of U.S. Senator Russ Feingold
## *At the Senate Judiciary Committee Hearing*
## *"Habeas Reform: The Streamlined Procedures Act"*

**November 16, 2005**

Mr. Chairman, I want to thank you for holding this hearing today on the Streamlined Procedures Act. You and others on the Committee have been working over the past few months to make changes to this extremely complex bill, and I am gratified that we have witnesses here today who can help us better understand the bill in its current form, as well as the very serious implications this bill could have for our criminal justice system. I also thank you for agreeing to hold another hearing on this bill before we proceed to a markup. Mr. Chairman, I think this is how the Senate is supposed to work: Before we proceed to report out complex legislation like this bill, we must be fully armed with the facts needed to evaluate it and allow us to make an informed recommendation to the rest of the Senate. Today's hearing is an important step in that process, and I thank you again for holding it.

I cannot overstate the significance of this bill. It would entirely rework federal habeas law. Even in its modified form, I have grave concerns about the havoc it would wreak.

I understand the concern about lengthy appeals in cases where prisoners bring federal habeas claims. But more than 120 people sentenced to die have been exonerated and released from death row, sometimes years after their convictions. And I have no doubt there are others we do not yet know about. Often, evidence of innocence does not come out until years after a conviction, and habeas is the only legal avenue that inmates have left to them.

Last year, a man in Texas was exonerated 17 years after he was convicted – and only after a federal court considering his case on a habeas appeal threw out the conviction. The prosecutor who could have retried him instead apologized, saying "I'm sorry this man was on death row for so long and that there were so many lost years." And just this summer, the St. Louis Post-Dispatch reported that a local prosecutor has reopened an investigation into a 1980 murder because the evidence against the man convicted of the crime had fallen apart. That man had been sentenced to death, and he was executed by the state of Missouri 10 years ago. Yet now, 25 years after the crime and 10 years after his execution, very serious questions about his guilt are being raised. I find this extremely troubling.

I am very seriously concerned about the effect this bill would have on inmates who argue they did not commit the crime of which they were convicted. But this is not just about claims of

innocence. This bill also would put up virtually insurmountable procedural bars preventing federal courts from evaluating serious constitutional flaws in criminal cases, including those where the ultimate punishment of death is at issue. A number of recent U.S. Supreme Court cases have found the proceedings by which an individual was convicted of a capital crime or sentenced to death to have violated the Constitution – and they have done so in the review of federal habeas proceedings. Under the law as this bill would revise it, the errors would have gone unaddressed.

Finally, I am concerned about this bill because it would fundamentally realign the role of federal courts in criminal cases. Our legal system has long recognized the importance of reducing constitutional error when an individual's liberty or life is at stake, by allowing even state inmates to challenge the constitutionality of their imprisonment in federal court through habeas corpus. This bill would undo that fundamental premise, stripping federal courts of the ability to hear many federal claims. This bill would not make the habeas process more efficient, as its proponents claim. It would prevent federal courts from hearing a great number of potentially meritorious claims in cases where our justice system must be most careful.

I sincerely hope, Mr. Chairman, that this Committee will listen closely to these witnesses and consider this bill carefully and thoroughly. There is no reason to rush to judgment on these very significant changes to our criminal justice system.

**The Hartford Courant**
EDITORIAL
October 25, 2005

## Don't Limit Habeas Appeals

Congress ought to kill a reckless proposal that would severely limit the right of appeal in criminal cases.

The Streamlined Procedures Act of 2005 would gut habeas corpus, the hallowed protection that allows prisoners to challenge in federal court the legality of their convictions. Habeas corpus is often the last resort for death row inmates asserting their innocence.

Separate versions of the bill are pending in the House and Senate. Each would impose new procedural hurdles that would effectively block many habeas appeals and thereby speed up executions.

The legislation has met with loud protests from judges, prosecutors, defense lawyers and conservative groups such as The American Conservative Union and The Rutherford Institute, which called the proposals "radical legislation" that "would likely result in the execution of citizens who have been wrongly convicted."

Habeas corpus was considered so important to the nation's founders that they enshrined it in the Constitution. Congress cannot abridge that guarantee, but can skirt it by imposing rules that would essentially thwart prisoner appeals.

There is no hard evidence that habeas appeals have clogged the federal courts or unduly dragged out final resolutions of cases.

The Judicial Conference of the United States, which runs the federal courts, told Congress that before it clamps down on habeas corpus, it ought to first determine whether there are excessive delays and, if so, what causes them. That makes sense.

Sponsored by Republican Sen. Jon Kyl of Arizona and Republican Rep. Daniel E. Lungren of Folsom, Calif., the Streamlined Procedures Act would make it tougher for convicts to assert their innocence - a proposal that ought to chill anyone who has followed the death penalty debate in recent years.

Dozens of convicts have been released from death row after it was determined they did not commit the crimes that led to their convictions. Just last year Congress passed the Innocence Protection Act in an attempt to reduce wrongful convictions.

To now cut off a convict's last appeal by denying habeas corpus would be a travesty.

**The Journal Gazette**
(Fort Wayne, IN)
EDITORIAL
August 2, 2005

## Executing bad judgment

Last Thursday, Senate Republicans delayed acting on a bill that would grease the route for faster executions. What they should have done was shred this legislation as if it were an old check, bury it deep and then urge their House colleagues to do the same. Pass either bill to restrict a defendant's access to federal review, and due process will no longer be a hallmark of American justice.

Since 1973, 119 death-row inmates have been exonerated because of new evidence. Some came within weeks and even days of dying.

Those are 119 reasons for the nation to consider the taking of a life for a life an extreme and unnecessary punishment. Life in jail without parole is a just alternative. Indeed, if that is the most severe punishment a killer can get, the families of victims will have some end to the legal trauma, not the long, drawn-out appeals accompanying any death penalty decision that the legislation purports to stop.

But apparently the fear of killing an innocent person isn't enough to keep politicians from proposing outlandish tough-on-crime legislation. The so-called "Streamlined Procedures Act" sounds like a euphemism from a satirical novel or something covering trade disputes. It is neither. It is, rather, legislation that would allow faster executions in a country that has at least 119 reasons to fear efficiency in matters of death.

Although the Senate and House bills differ slightly, the effect is the same: Clamp down on federal review, and in some cases eliminate it altogether; create new procedural hurdles; and set arbitrary time limits on appeals. And some legal experts have come up with unique and graphic ways to portray the damaging legislation.

"This is radical surgery that is being proposed, the functional equivalent of amputating four limbs to improve the blood flow of a healthy and functioning human body," said Bernard Harcourt, a University of Chicago law professor testifying on June 30 before the House.

He added: "This proposed legislation would not only deprive federal courts of jurisdiction to review highly meritorious claims, but would also spawn a new round of constitutional and statutory litigation that would preoccupy federal courts for the next decade – or at least until the next wave of habeas reform."

But why listen to an expert when you can look tough for constituents?

The death penalty is largely dependent on the race and resources of both the killer and victim, the location of the crime, which judge, jury, prosecutor and defense attorney handles the case. Recent studies have shown it to be ineffective in deterring crime. It's expensive, and society gets nothing from it.

**Kansas City Star**
(Kansas City, MO)
EDITORIAL
July 15, 2005

# Trial and Error: Death Penalty
## Proof That Innocent People Have Been Executed Could Save Others From the Same Fate

Condemned men usually are resigned, stoic even, as their execution draws near.

Larry Griffin was different as he faced lethal injection in 1995. "Larry went down with an attitude," attorney Sean O'Brien said. "He had bread and water for his last meal."

Most inmates thank their lawyers for trying to save them, said O'Brien, who has been with many in their final hours. Griffin did not.

"We did everything we could," one of his lawyers told him.

"It wasn't enough," the condemned man replied.

O'Brien told that story as he spoke to a group of lawyers Tuesday in Kansas City. He had a reason for discussing an execution that occurred 10 years ago. The day before, St. Louis Circuit Attorney Jennifer Joyce had announced that, because of evidence pointing to Griffin's possible innocence, she was opening a new investigation into the murder for which he was executed.

If Joyce determines Griffin did not kill Quintin Moss in a 1980 drive-by shooting in St. Louis, it would be the first time since the death penalty was reinstated in the United States that a person was cleared of a crime after being put to death.

Griffin always denied killing Moss. No physical evidence connected him to the shooting. The prosecution's key witness was a felon from Boston, a heroin addict in the federal government's witness protection program. He claimed to have been about 20 feet away when shots fired from a moving car killed Moss, 19, and wounded another man.

Samuel Gross, a University of Michigan law professor who opposes the death penalty, adopted Griffin's case as a project. The NAACP Legal Defense and Educational Fund financed a yearlong investigation. Among other things, witnesses said the heroin addict, a white man, wasn't at the scene when the murder occurred in the nearly all-black neighborhood.

Gross has a political motive for clearing Griffin in memoriam. Evidence that an innocent man had been executed would sway a public that is becoming increasingly queasy about

the death penalty.

More than 100 death row prisoners around the nation have been freed after new evidence nullified their convictions. But advocates of capital punishment claim the exonerations prove the system works because no innocent person has been put to death.

That argument leaves O'Brien cold.

"When people ask me, Has Missouri executed an innocent person?' I point them to Larry Griffin," he said.

O'Brien and his law partner, Kent Gipson, took on Griffin's appeals in the early 1990s. Griffin, who grew up in a St. Louis housing project, had been convicted of murdering Moss, a drug dealer, a decade earlier.

The attorneys located Robert Fitzgerald, the heroin addict who had testified for the prosecution.

"He told us a much different story," O'Brien said. "He admitted that he lied when he testified in court, that he didn't see Larry Griffin."

But Fitzgerald's reversal wasn't enough. A federal judge who reviewed the case chose to believe the account given at trial.

The missing link was the man wounded in the drive-by shooting. Neither the prosecution nor the defense had called him to testify. O'Brien and Gipson looked for him but had limited Internet resources at the time.

"We couldn't find him," O'Brien said.

After Griffin's execution, an investigator working for Gross located the man in Los Angeles. He had left Missouri after the shooting. The man told the investigator he'd seen the face of the shooter, and it wasn't Griffin.

"He was shocked to find that Larry Griffin had been executed for the murder of Quintin Moss," O'Brien said.

Joyce is courageous to reopen the investigation. Too many prosecutors refuse to acknowledge the possibility that guilty verdicts can be wrong.

They can, though. The fact that new evidence is coming to light in Griffin's case now should resound in the U.S. Congress. The Senate and House are considering legislation that would prevent many death row inmates from challenging their convictions in the federal courts after other appeals have failed.

The proposed legislation, named the "Streamlined Procedures Act of 2005," would

narrow the circumstances under which an inmate could seek federal review, bar the courts from considering key issues, and set arbitrary timetables for rulings.

It is a frightening proposal. DNA testing has proven, without a doubt, that innocent people are sentenced to death. Closing a window of appeal increases the likelihood that they will be executed.

Sponsors of the Streamlined Procedures Act are catering to critics who claim the appeals process for capital cases is too costly and takes too long.

In Larry Griffin's case, the span between arrest and execution took 15 years. That is looking increasingly like a fatal rush to judgment.

**Kansas City Star**
(Kansas City, MO)
EDITORIAL
October 6, 2005

# INMATES' RIGHTS
## Brownback should vote 'no'

U.S. Sen. Sam Brownback of Kansas could play a key role today in preserving essential legal protections by voting against a bad bill before the Senate Judiciary Committee. Called the Streamlined Procedures Act, the measure seeks to narrow the circumstances under which federal courts can review the cases of inmates — including those on death row.

The bill is an assault on the right to habeas corpus, a legal privilege explicitly protected by the Constitution. The sponsor is Sen. Jon Kyl, an Arizona Republican.
Besides stopping defendants from appealing in federal courts, the measure would prevent judges from considering key issues in some cases that do reach their courtrooms. And it would give the U.S. attorney general — a prosecutor — the power to prevent federal courts from hearing some cases.

This attempt to dismantle constitutional protections comes as DNA evidence has proved, beyond a doubt, that some innocent people are sentenced to long prison terms and even death. Polls show the public is increasingly uncomfortable about the prospect of fatal errors by the criminal justice system.

Shouldn't the senators be just as concerned?

The Judiciary Committee will vote on the bill today. Brownback's position is considered pivotal.

Brownback, an outspoken opponent of abortion, speaks often of protecting the innocent. That concern should extend to inmates who may have been wrongfully convicted.

**Keene Sentinel**
(Keene, NH)
EDITORIAL
July 23, 2005

# Death Tales

Two death-penalty stories are making news this month, one from Washington, D.C., and one from St. Louis, Missouri. They are an awkward pair.

In Washington, Congress is considered likely to pass legislation to restrict access to federal courts by defendants who contend they received unfair trials in capital cases. The "Streamlined Procedures Act of 2005" — spiffy title — is designed to make sure people convicted of murder are quickly punished without federal courts meddling into the sorts of abuses we have been hearing so much about in recent years: sleeping and drunken death-case attorneys, prosecution witnesses bribed with reduced sentences, the man convicted even though he was at a busy picnic miles away at the time of the crime, the string of Death Row inmates proven innocent by their DNA.

These revelations are too much for some members of the U.S. House and Senate. By "streamlining" punishments, they hope to eliminate the embarrassments associated with capital punishment. Their bill would prohibit federal review of most cases from states the Justice Department certifies as providing defendants with competent counsel. The likely consequence of this act would be that fewer innocent people would be exonerated.

Meanwhile, in St. Louis, a judge has ordered that Larry Griffin's 1981 murder conviction be reexamined. Griffin was found guilty of the 1980 drive-by killing of a 19-year-old man. But a new investigation of the case, conducted by a Michigan law-school professor, indicates that Griffin didn't do it.

Among other things, the report finds evidence that the only person who identified Griffin as the killer was not present on the street corner when the killing occurred. That man later admitted, "I didn't see nothing." The first police officer who arrived at the crime scene also says the supposed witness was not there.

However, a real witness to the crime — a man who was wounded by the bullets and who knew Griffin —has said that Griffin was not the killer. That man was not called to testify at the trial.

The Streamlined Procedures Act won't have any effect on this case, as it applies only to federal courts. Over the years, as Griffin proclaimed his innocence, his appeals were repeatedly considered, and rejected, by federal courts, including the U.S. Supreme Court. He long ago ran out of options.

But now his case will get a thorough going over at the state level. A Missouri congressman sent a copy of the law professor's report to a St. Louis circuit judge. The judge says she will re-examine the evidence "fully, meticulously and with a completely open mind." So the conviction could conceivably be overturned right in state court. Another reason the Streamlined Procedures Act won't have any effect on this case is that Larry Griffin was executed on June 21, 1995.

**Knight-Ridder News Wire**
EDITORIAL
July 23, 2005

## Don't Rush to Judgment

In a gutsy move in pursuit of justice, the top city prosecutor in St. Louis plans to test the plausible theory that convicted murderer Larry Griffin didn't gun down a drug dealer 25 years ago.

But even if prosecutor Jennifer Joyce's reinvestigation exonerates Griffin, it won't matter to the convicted man.

He was executed a decade ago.

Whether or not Griffin is cleared posthumously, his case should stand as a chilling warning to Congress.

Amid Washington lawmakers' latest drive to further restrict the appeals of defendants, they need to recognize what could be at risk with their tough-on-crime crackdown - innocent lives.

In both Senate and House versions, the innocently titled Streamlined Procedures Act amounts to an unconscionable assault on federal court oversight of the fairness of criminal trials in the state courts.

The Republican-sponsored measure would deny or sharply restrict the reach of federal judges in hearing habeas-corpus claims from convicts. These claims range from whether adequate legal counsel was provided to indigent (and often minority) defendants, on up to whether an innocent person may have been convicted wrongly.

In death-row cases, the stakes are as high as they come. In other criminal matters, the federal judiciary's policing of such cases assures that our criminal justice system is truly just.

Strict limits on such appeals were already imposed in 1996 under a post-Oklahoma City bombing, Clinton-era antiterrorism law - and there's no good reason to tighten them further.

At a recent Senate hearing, proponents argued unimpressively that the appeals delayed "closure" for crime victims, while running up government legal bills.

Isn't the cost of responding to appeals simply the price of successful anticrime efforts that have put 2.1 million people behind bars? Lock up the bad guys, by all means, but don't turn around and scrimp on fairness.

The impact of lengthy appeals on crime victims cannot be ignored. But there is a psychological toll, too, on convicts sitting behind bars who know they are innocent, some of them on death row.

There have been dozens of people exonerated while awaiting execution in recent years, often after years of painstaking appeals and probing of their claims of innocence. What if these inmates had not succeeded in their appeals in time?

Surely advocates of limiting convicts' federal appeals don't mean to respond to the troubling fact of death-row exonerations by strapping the possibly innocent to a gurney sooner.

Isn't it odd how some in Congress - mostly Republicans, but some Democrats, too - regard the federal courts as the best venue for class-action lawsuits involving consumer-product safety, environmental pollution and civil rights. Yet they don't want to bother the same highly regarded federal bench with cases concerning the fundamental rights of life and liberty?

A system of justice streamlined to the degree proposed under this measure would not be justice at all.

**Statement of Senator Patrick Leahy,**
**Ranking Member, Committee on the Judiciary**
**Hearing on Habeas Legislation (S.1088)**
**November 16, 2005**

I thank the Chairman for agreeing to hold this hearing on S.1088, the so-called "Streamlined Procedures Act," or SPA. This is our second hearing on the bill. Since our first hearing, back on July 13, the bill has been strongly opposed by a wide range of experts and practitioners, and it has twice been rewritten.

I am thankful that we are at least holding hearings on this bill. Yesterday the Senate voted to strip federal courts of the authority to consider habeas petitions from detainees being held in U.S. custody as enemy combatants. At no time before in our Nation's history have habeas rights been permanently cut off from a group of prisoners, yet we did it without even holding a committee hearing on an issue so fundamental to the basic precepts and basic rights under our system of government that it predates our Constitution.

We have a distinguished panel of witnesses today, and I welcome them all and thank them for coming. I am especially pleased that we are joined once again by former Solicitor General Seth Waxman. When the Committee adopted the current version of the bill in October, it was claimed that this version addressed, or at least substantially addressed, all the concerns that Mr. Waxman and others had raised about earlier versions. In fact, it does not come close to doing so. I am glad he could be here to set the record straight.

The current version of the bill suffers from nearly all of the same infirmities as its predecessors. Like its predecessors, this bill seeks to impose radical and unprecedented restrictions on the Great Writ of habeas corpus. It would inject confusion into settled law, which can only increase litigation time, not decrease it. And it would eliminate essential protections against wrongful convictions without making adequate provision for claims of innocence.

One thing is clear about this bill: If it passed, it would preclude federal courts from enforcing federal constitutional rights.

The legal community recognizes this. The American Bar Association calls the bill before us "a significant setback for justice." Both the U.S. Judicial Conference and the Conference of Chief Justices have expressed grave concerns with the bill and urged further study and analysis before we start tearing apart the complex edifice that is federal habeas law. The state chief justices cautioned us against passing a bill with "unknown consequences for the state courts and for the administration of justice." The Judicial Conference reported that the vast majority of habeas cases are already moving expeditiously through the system. We will hear more from the Judicial Conference this morning.

I know the bill has its defenders. But not one defender of the bill has offered *systemic* evidence of a real *national* problem with federal habeas corpus under the current, post-AEDPA regime. This bill remains a solution to an unproven and largely non-existent problem, and no amount of tinkering will solve that.

If we are serious about reforming the system to improve the quality, efficiency and finality of criminal justice, there is a different solution we should focus on. Unlike the SPA, it is a solution that would solve problems in the criminal justice system before they arise, rather than complicating the process of responding to problems via habeas. Unlike the SPA, it is a solution supported by the legal community and the public at large. And unlike the SPA, it is a solution to which the President and both House of Congress have previously committed on a bipartisan basis. It is a promise we made to the American people, and we have a duty not to renege on it.

I speak, of course, of the Innocence Protection Act. We passed that Act one year ago, in response to the shameful, widespread evidence of hopelessly underfunded, too often incompetent, and even drunk and sleeping defense counsel in state capital trials. We did so because we saw only too well the costs of that systemic failure: Innocent men on death row, and repeated, fundamental violations of constitutional rights.

The Innocence Protection Act established a new grant program to improve the quality of legal representation provided to indigent defendants in state capital cases. This program would greatly reduce the risk of error in these cases. It would also reduce the frequency of the most expensive and drawn-out post-conviction proceedings – the potentially meritorious ones. It would, that is, if we funded this program at or near the modest levels we authorized. If we are truly committed to improving the criminal justice system, we should not let Congress's check bounce.

We all agree that the trial should be the main event and abuses of habeas corpus should not be tolerated. But let us remember that the trial process itself is flawed and that it will remain flawed if we continue to skimp on essential funding. Let us remember that wrongful convictions do occur, and many innocent people have been sentenced to death. Let us remember what Justice O'Connor has told us: The death penalty system is so flawed in America today that we have probably already executed an innocent person. And let us not pass ill-conceived, unnecessary legislation that would only make an unacceptable situation far worse.

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**Los Angeles Times**
EDITORIAL
July 13, 2005

## Streamline or steamroll?

THERE IS A GROWING awareness in this country, given a growing number of exonerations based on DNA and other evidence, that it's too easy for innocent people to land on death row. These cases help explain why public support for the death penalty has been eroding.

The U.S. Supreme Court is increasingly alarmed by the quality of legal representation afforded defendants in capital cases, and some states are hesitant to apply the death penalty given mounting doubts about the level of error built into their judicial systems. So it's the opposite of logic to see some in Congress moving the other way, seeking to curtail the ability of federal courts to hear claims of an improper trial from defendants convicted in state court.

The Senate today holds a hearing on the ill-advised and Orwellian-sounding Streamlined Procedures Act. What this legislation and its House companion threaten to streamline is the execution or lifetime incarceration of the innocent. The federal judiciary is the ultimate guarantor of Americans' constitutional rights, including the right to due process, and it's sad to see members of Congress (including California's former attorney general, GOP Rep. Dan Lungren) eager to further limit federal oversight over flawed state proceedings.

The centerpiece of the legislation would eliminate the review of most claims for cases coming out of states that the U.S. Department of Justice has certified as providing defendants with competent counsel. Should we leave it up to Atty. Gen. Alberto R. Gonzales, he of the torture memos, to pass judgment on the quality of representation given convicts in Texas? Sounds like a great idea if you are a state prosecutor annoyed at those pesky federal judges.

The measure may even be unconstitutional — it's for a federal court, not a federal prosecutor, to determine whether states are violating the U.S. Constitution.

To sell their "streamlining" law, its proponents are offering to leave the door to the federal courthouse ajar for defendants who can point to evidence of their actual innocence. This is a cynical ploy. It's pretty hard to produce such evidence if your right to a competent lawyer has been denied, or if a prosecutor got someone to lie on the witness stand.

Exonerations of people wrongly convicted of a crime typically start with a finding that there was a procedural flaw in the case, and only subsequent fair hearings establish the truth. That's one reason Congress ought to stand up for the due process rights of all Americans.

**STATEMENT OF JUDGE HOWARD D. MCKIBBEN**
**ON BEHALF OF**
**THE JUDICIAL CONFERENCE OF THE UNITED STATES**
**BEFORE THE COMMITTEE ON THE JUDICIARY**
**UNITED STATES SENATE**
**HEARING ON**
**"HABEAS REFORM: THE STREAMLINED PROCEDURES ACT"**
**November 16, 2005**

Mr. Chairman, Senator Leahy, and members of the Senate Judiciary Committee, I am Howard McKibben, a United States district court judge from the District of Nevada and Chair of the Judicial Conference Committee on Federal-State Jurisdiction. I am testifying today on behalf of the Judicial Conference of the United States, the policy-making body of the federal judiciary. I appreciate the opportunity to participate in today's hearing on the proposed Streamlined Procedures Act of 2005 and respectfully offer the views of the Judicial Conference on the latest version of S. 1088, the substitute amendment adopted by the Judiciary Committee on October 6, 2005 (hereinafter referred to as the "October Substitute").

The judiciary appreciates the concerns of the sponsors of the Streamlined Procedures Act who have called for procedural reform of habeas corpus in order to ensure greater finality in the criminal justice process and more prompt administration of justice. The judiciary shares the goal of eliminating any *unwarranted* delay in the fair resolution of habeas corpus petitions filed by state prisoners in the federal courts. At the same time, we would urge that before Congress considers additional amendments to habeas corpus procedures, analysis be undertaken to evaluate whether there are any *unwarranted* delays

occurring in the application of current law in resolving habeas corpus petitions filed in the federal courts by state prisoners and, if so, the causes for such delays.

The federal judiciary appreciates the efforts of the Chairman of the Committee and the sponsors of S. 1088 to address the issues identified by the Judicial Conference in its letters dated July 13, 2005, and September 26, 2005, to members of the Senate Judiciary Committee on earlier versions of the legislation. Although the Judiciary Committee has made changes intended to meet some of the objections previously expressed by the Conference, we continue to have concerns with the legislation as described below.

**I. July 13, 2005, Letter of the Judicial Conference**

In its letter of July 13, the Judicial Conference expressed opposition to certain provisions in sections 8, 9, and 11 of S. 1088, as introduced. Those provisions would: (1) require courts of appeals to hear and adjudicate appeals from district court decisions regarding habeas corpus petitions within certain time deadlines; (2) shift from the federal courts to the Attorney General of the United States the responsibility for determining, in capital cases under chapter 154 of title 28, United States Code, whether a state has established a qualifying mechanism for providing competent counsel to indigent defendants in state post-conviction proceedings; (3) place judicial review of the Attorney General's decision solely in the U.S. Court of Appeals for the D.C. Circuit, providing that

the certification decision would be conclusive "unless manifestly contrary to the law and an abuse of discretion"; and (4) amend 21 U.S.C. § 848(q)(9) to limit *ex parte* applications for expert services, give prosecutors the right to intervene in the defense funding application process, and require immediate public disclosure of payment information. These provisions, which are included in the October Substitute, for the most part remain unchanged from the bill as introduced, and therefore, the Conference continues to oppose these provisions.

## II. September 26, 2005, Letter of the Judicial Conference

On September 26, 2005, the Judicial Conference provided a second letter to members of the Senate Judiciary Committee based on action taken by the Judicial Conference at its September 20, 2005, session. The positions of the Judicial Conference expressed in that letter addressed the substitute amendment approved by the Senate Judiciary Committee on July 28, 2005 (hereinafter referred to as the "July Substitute").

### A. Provisions Related to Retroactivity and *Ex Parte* Funding Requests in the October Substitute

The October Substitute makes no changes to the July Substitute with respect to two of the positions adopted by the Conference in September. First, the Judicial Conference opposed provisions of the Streamlined Procedures Act contained in the July Substitute that would apply the new rules in that statute to pending federal habeas proceedings. Such retroactive application could complicate and protract, not curtail, the

disposition of pending cases and may cause further litigation related to issues of fairness. The October Substitute continues to retroactively apply the Antiterrorism and Effective Death Penalty Act of 1996 to cases pending prior to its enactment and would apply certain provisions of the Streamlined Procedures Act to pending cases. Because these provisions in the October Substitute are identical to those in the July Substitute, the Conference reiterates its objections.[1]

Second, the Conference opposed the provision in section 10 of S. 1088 that would amend 21 U.S.C. § 848(q) to require an application for investigative, expert, or other services in connection with challenges to a capital conviction or sentence involving state or federal prisoners to be decided by a judge other than the judge presiding over the habeas corpus proceeding. This provision also remains unchanged in the October Substitute, and thus the Conference opposes this provision.

The October Substitute does significantly change the July Substitute with respect to the treatment of unexhausted claims, amendments to petitions, procedurally defaulted claims, and the tolling of the limitation period. In many instances, however, those

[1]A potential problem of the retroactivity provisions is illustrated by the current version of section 4, which provides that the procedural default provisions shall not apply to claims on which relief was granted by a district court prior to the enactment of the Act. Such a rule would make the new rules applicable to a variety of pending claims, including those that were pending in state post-conviction proceedings and those that had been filed in federal court but on which the district court had yet to reach the merits or to grant relief. The rule could also result in the disparate treatment of similarly situated applicants: the October Substitute's approach to procedural default would apply to applicants who appeal the denial of their claims by the district court, but an identical claim that the state was appealing from a decision granting relief would be governed by current law.

changes do not resolve the concerns of the Judicial Conference, as explained below. The October Substitute also raises concerns with respect to the rules for reviewing procedurally problematic claims in the context of capital cases under chapter 154 of title 28, United States Code.

**B. Treatment of Unexhausted and Procedurally Defaulted Claims**

In September 2005, the Judicial Conference opposed the provisions related to unexhausted claims, procedurally defaulted claims, and the tolling of the limitation period included in the July Substitute. Those provisions had the potential to (1) undermine the traditional role of the federal courts to hear and decide the merits of claims arising under the Constitution; (2) impede the ability of the federal and state courts to conduct an orderly review of constitutional claims, with appropriate deference to state-court proceedings; and (3) prevent the federal courts from reaching the merits of habeas corpus petitions by adding procedural requirements that may complicate the resolution of these cases and lead to protracted litigation.

With respect to unexhausted claims, the Judicial Conference opposed the provisions of the July Substitute. Those provisions would have amended current law to delete provisions that permit federal courts to forgive the failure to exhaust where the state provides no corrective process or where such process would not provide an effective remedy, *see* 28 U.S.C. § 2254(b)(1)(B)(I)-(ii), and would have limited federal court review of unexhausted claims except for those meeting the standards of 28 U.S.C.

§ 2254(e)(2).[2] Those provisions also would have required dismissal with prejudice of unexhausted claims not qualifying under section 2254(e)(2) instead of providing for a stay of the proceeding pending exhaustion of potentially meritorious claims. In *Rhines v. Weber*, 125 S. Ct. 1528 (2005), the Supreme Court ruled that a district court may stay proceedings on a mixed petition if the applicant can show good cause for the failure to exhaust, that the claim is potentially meritorious, and that the applicant has not engaged in dilatory litigation tactics.

The Judicial Conference also opposed provisions that would have limited federal court review of procedurally defaulted claims, except for those claims meeting the requirements of 28 U.S.C. § 2254(e)(2).

Although the October Substitute would replace the section 2254(e)(2) requirements with different prerequisites for federal court review of unexhausted or procedurally defaulted claims, those new prerequisites also raise concerns for the judiciary. The October Substitute recasts the "cause-and-prejudice" standard defined and developed by the Supreme Court, and it modifies the current "actual innocence" standard.

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[2]Under section 2254(e)(2), a federal court may hold an evidentiary hearing on a claim the applicant failed to develop in state court if:

> (A) the claim relies on —
>
> (I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

These revised standards, never before applied in this manner, create complexity and could further delay, not expedite, the resolution of federal claims. Moreover, complying with such standards may be even more problematic in cases where the applicant did not have counsel in state post-conviction proceedings.

The October Substitute would continue to require dismissal of unexhausted claims with prejudice and would also delete the provisions in current law that permit a federal court to forgive a failure to exhaust if the state provides no corrective process. Although it would not require an unexhausted claim to qualify for consideration under section 2254(e)(2), a federal habeas court would be permitted to reach the merits of such a claim only if the applicant can show "cause"[3] for the failure to exhaust and a "reasonable probability" that but for the alleged error, the fact finder would not have found that the applicant "participated in the underlying offense," or if the applicant can show that but for the alleged error it is "more likely than not" that no reasonable fact finder would have found that the applicant participated in the underlying offense. These are new standards that have never before been applied to the exhaustion doctrine. In either circumstance, the federal court would also have to conclude that denial of relief would be contrary to or involve an unreasonable application of clearly established federal law, as determined by the Supreme Court, or would entail an unreasonable determination of a factual matter.

[3]The legislation does not provide a definition of the term "cause." It is thus unclear if cause is intended to incorporate the case law that has developed in the context of the cause-and-prejudice standard in reviewing procedurally defaulted claims or is intended to establish some new standard.

These same standards would also govern federal court review of procedurally defaulted claims.[4]

By these provisions, the October Substitute would modify the law that governs relief from procedural defaults under the "cause-and-prejudice" standard articulated in *Wainwright v. Sykes*, 433 U.S. 72 (1977). Leading cases define cause as an external impediment to the applicant's ability to raise the claim. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). The prejudice inquiry focuses on the likely impact of an error on the fairness of the trial; courts will ask if errors at trial "worked to [the applicant's] *actual* and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions." *See United States v. Frady*, 456 U.S. 152, 170 (1982).

The October Substitute seeks to make a problematic change to the well-established cause-and-prejudice standard. It redefines prejudice as a "reasonable probability that, but for the alleged error, the fact finder would not have found that the applicant participated in the underlying offense." The reference to the underlying offense changes the traditional focus of habeas relief from an inquiry into whether a constitutional error has tainted the trial process, to an inquiry into whether the error would cast doubt on the claimant's participation in the underlying offense. Constitutional errors that occur during

[4]In addition to the changes described above, the October Substitute would permit a federal court to consider a procedurally defaulted claim if the United States Supreme Court has determined that a particular state procedural rule does not afford a reasonable opportunity to present the federal claim, or the state through counsel expressly waives the requirement.

sentencing might not be reviewable under such a standard, because such errors may have no bearing on whether the applicant "participated in the underlying offense." For example, an applicant's challenge in a capital proceeding to the aggravating factors that justified imposition of the death penalty would not necessarily disprove "participation" in the offense. Other constitutional errors might infect the guilt phase of the trial within the meaning of *Frady* but similarly fail to establish non-participation in the underlying offense.[5]

The October Substitute also contains a provision that appears to track the "actual innocence" exception of current law. *See Murray v. Carrier*, 477 U.S. at 496 (permitting review of a procedurally defaulted claim where "a constitutional violation has probably resulted in the conviction of one who is actually innocent"). Like the prejudice inquiry, this modified actual-innocence inquiry is framed in terms of participation; relief may be granted only if the applicant shows that "it is more likely than not that no reasonable fact finder would have found that the applicant participated in the underlying offense." As with the revised cause-and-prejudice standard, this provision could foreclose review of sentencing errors, and thus is inconsistent with the position of the Judicial Conference. Furthermore, shifting the focus from "actual innocence" to "non-participation in the underlying offense" would introduce uncertainty and complexity in the law and would create new problems for both the state and federal courts.

[5]For example, *see* Banks v. Dretke, 540 U.S. 668 (2004) (state concealed evidence during sentencing phase in violation of *Brady v. Maryland*, 373 U.S. 83 (1963)).

It is also worth noting that sections 2 and 4 of the October Substitute include language that would provide that the state is not required to answer any unexhausted or procedurally defaulted claim unless the court first determines that the claim qualifies for consideration under either the revised cause-and-prejudice standard or the modified "actual innocence" standard. The intent and effect of these provisions are unclear. If intended to eliminate the state's need to file any response at all in such cases, these provisions could impose a new and substantial burden on the district courts.

**C. Tolling of Limitation Period**

The July Substitute would have amended 28 U.S.C. § 2244(d)(2) to delete the words "judgment or" from the statute, permitting tolling only as to those federal claims that were actually included in the state post-conviction petition. The habeas applicant would have been required to submit all federal claims to the state post-conviction court, even where those claims had been previously raised in state court on direct review and exhausted for purposes of federal habeas review. When the Conference opposed this provision, it was noted that the provision could have burdened state post-conviction proceedings and resulted in the forfeiture of claims that were presented on direct review but omitted from the state post-conviction proceeding.

The October Substitute partially addresses this problem by allowing the federal habeas limitation period to be tolled if the application for state post-conviction relief includes at least one federal constitutional claim. It would enable (as under current law)

a state prisoner to submit one or more federal claims in the state post-conviction process (such as an ineffective-assistance-of-counsel claim that was not subject to exhaustion on direct review) and thereby toll the federal habeas limitations period during the exhaustion of such federal claims. Following the completion of the state process, the state prisoner would be able to combine all federal claims (including those that were exhausted on direct and collateral review) into a single, timely federal habeas petition.

It should be noted, however, that the October Substitute could produce a situation in which an applicant is required to file a federal habeas challenge to a state court conviction while state post-conviction proceedings remain pending. Such overlapping state and federal collateral litigation might occur if the applicant exhausted all of his or her federal claims on direct review and had no federal claims to present in state post-conviction proceedings. Under the October Substitute, the state post-conviction proceeding would not toll the federal limitation period, and the applicant could not wait until the state process ended. Such overlapping litigation seems inconsistent with the policy of federal respect for state court proceedings that underlies the exhaustion rule, and the notion of preserving federal judicial resources for the review of convictions that the state courts have upheld against all challenges based upon state and federal law.

The October Substitute, like the July Substitute, could be read to deny tolling credit for periods when no actual proceeding is pending before the state court.[6] Such an

[6]The tolling provisions in the October Substitute include language, not found in previous versions of the Streamlined Procedures Act, that refers to "an application for State post-conviction or other collateral

approach could produce tolling results inconsistent with the Supreme Court's decision in *Carey v. Saffold*, 536 U.S. 214 (2002), which permits the one-year limitation period to be tolled from the initiation of the state post-conviction proceeding at the trial level to the completion of the proceeding at the appellate level, provided that the applicant has met all relevant state-court deadlines. The October Substitute also would continue to preclude federal courts from equitably tolling the one-year time period. For the same reasons that it opposed these provisions in the July Substitute, the Conference continues to oppose these provisions in section 5 in the current version.

**D. Capital Cases under Chapter 154**

In its September 2005 letter, the Judicial Conference did not discuss section 8(a) of S. 1088 related to the scope of federal-court review of capital cases under chapter 154. The July Substitute would have provided that capital cases arising under chapter 154 follow the standards of chapter 153 in several aspects. The Conference did, of course, comment on proposed amendments to chapter 153 that would have limited federal court review of unexhausted or procedurally defaulted claims to only those claims meeting the standards of section 2254(e)(2). The October Substitute makes further changes in section 8(a).

With regard to the standard of review to be applied to the merits of habeas petitions under chapter 154, the October Substitute follows the basic approach of the July

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review that is pursued in the original-writ system of a State. . . ." The potential scope of this language is unclear.

Substitute. Section 8(d) specifically incorporates the chapter 153 standard of review that governs review for claims that the applicant has properly exhausted and preserved for federal habeas review. That standard allows relief only where the state court reaches a conclusion that is contrary to or involves an unreasonable application of Supreme Court law or is based on an unreasonable determination of a factual matter.

The October Substitute, therefore, creates two different standards for procedurally problematic claims (*i.e.*, claims not exhausted, procedurally defaulted claims, or claims not originally included in the federal habeas petition). Under chapter 153, as described earlier, the October Substitute applies either a revised cause-and-prejudice standard or a modified actual-innocence standard to determine whether a federal court may reach the merits of a procedurally problematic claim. Under chapter 154, the October Substitute would permit a federal court to consider similar procedurally problematic claims in the capital context only where the applicant meets the demanding requirements set forth in current section 2254(e)(2).[7] That provision would permit a court to award relief only in cases where the claim relies upon a new rule of constitutional law made retroactively applicable to cases on collateral review by the Supreme Court or on a factual predicate that could not have been previously discovered, and where the facts would establish by clear and convincing evidence that the applicant was not guilty of the underlying offense.

[7]It should be noted that 28 U.S.C. § 2266(b)(3)(B) currently limits amendments to applications for a writ of habeas corpus under chapter 154.

Requiring procedurally problematic claims in capital cases under chapter 154 to meet the requirements of section 2254(e)(2) raises concerns similar to those expressed in the Conference opposition to similar claims under chapter 153 as potentially imposing too great a restriction on the adjudication of constitutional claims.

**E. Amendments to Habeas Petitions**

In its September 2005 letter, the Judicial Conference also opposed section 3 of the July Substitute, which would prohibit the federal courts from considering modifications to existing claims or the addition of new claims that meet the requirements of current law. The July Substitute would have limited the amendment of existing claims or the presentation of additional claims in habeas petitions, unless those amendments met the requirements applicable to claims in second or successive petitions that were not previously presented. *See* 28 U.S.C. § 2244(b). While not identical, these requirements closely mirror the requirements of section 2254(e)(2).

In opposing section 3, the judiciary noted that the Supreme Court recently narrowed the scope of amendments to petitions that will qualify for relation-back treatment under current law, permitting amendments to existing claims or new claims to be presented only if such claims arise from the same discrete set of factual occurrences that underlie the petition's original claims. Only where the new claim rests upon facts of the same "time and type" will it relate back to the original petition. *See Mayle v. Felix*, 125 S. Ct. 2562 (2005).

The October Substitute changes the circumstances in which an applicant could modify existing claims or add new claims by requiring such claims to meet the revised cause-and-prejudice standard or the modified actual-innocence standard that would be applicable to federal-court review of unexhausted or procedurally defaulted claims. All claims modified or amended after the one-year limitation period has run (or after the state has filed its answer) that could not meet either of the revised standards would be regarded as time-barred.

In opposing the similarly restrictive approach in the July Substitute, the Conference observed that the provision could prevent the refinement of existing claims during the course of habeas litigation and foreclose meritorious claims that might qualify for relation-back treatment under *Mayle*. As claims are refined through the adversarial process, the courts may permit amendments where that is the appropriate means of focusing the arguments on relevant issues. Accordingly, because the Judicial Conference opposes legislation that would add procedural requirements that may impede the courts' ability to resolve cases on the merits, the judiciary opposes these provisions in the October Substitute.

## III. Conclusion

The Judicial Conference appreciates the Judiciary Committee's efforts to take into account the concerns raised in our letters of July 13 and September 26, 2005. As I noted earlier, the Conference supports the elimination of unwarranted delay in the fair resolution of habeas corpus petitions. As noted in the attachment to the September 2005 letter, a preliminary analysis of the statistical data indicates that no significant delays appear to exist with respect to non-capital habeas corpus petitions. As noted in that same attachment, the data regarding capital cases are inconclusive and suggest the need for further analysis. The Conference is committed to working with the Congress to identify the causes of any unwarranted delays. At the same time, the Conference wishes to express concerns about legislation that could preclude the federal courts from reviewing meritorious constitutional claims and, with the creation of new procedural hurdles, could protract rather than streamline consideration of habeas petitions in the federal courts.

Thank you for your consideration of these views.

**Office of Legislative Affairs, Administrative Office of the U.S. Courts**
**Thurgood Marshall Federal Judiciary Building**
**One Columbus Circle, NE, Suite 7-110**
**Washington, DC 20544**
**202-502-1700**

**New York Times**
EDITORIAL
July 16, 2005

# Court Gutting in Congress

Congress is quietly considering whether to destroy one of the pillars of constitutional law: the habeas corpus power of the federal courts to determine whether an indigent defendant has been unjustly sentenced to death in state courts.

A bill making alarming progress in committee would effectively strip federal courts of most review power and shift it to the attorney general. That's right: the chief prosecutor of the United States would become the judge of whether state courts behave fairly enough toward defendants appealing capital convictions. If a state system was certified as up to snuff, then the federal courts would lose their jurisdiction and condemned defendants their last hope.

It is appalling that lawmakers would visit such destruction on a basic human right that's been painfully secured across three centuries of jurisprudence. Repeatedly, federal court scrutiny has laid bare the shoddy state of capital justice in the states. DNA science has drawn attention to the frequency of false convictions.

The injustices of the criminal court process flow considerably from the widespread lack of competent defense counsel in the first place. Yet the proposal would allow state courts greater cover in pronouncing their own flawed convictions as too "harmless and nonprejudicial" to merit further review.

Proponents insist that truly meritorious complaints would somehow survive under this oppressive bill. In fact, it would make the execution of the innocent even more likely than it already is.

**Philadelphia Inquirer**
EDITORIAL
October 28, 2005

# The Miers Impact Put the Brakes on a Bill that Speeds Up Executions

She's not going to the U.S. Supreme Court after all, but Harriet Miers helped further the cause of justice this week - if only indirectly.

Her planned confirmation hearing figured in a welcome decision to postpone Senate action on a bill that launches an unconscionable assault on judicial fairness.

Amid the press of confirmation business, the Senate Judiciary Committee chaired by Sen. Arlen Specter (R., Pa.) scrapped a hearing Wednesday on the innocuously titled Streamlined Procedures Act.

Specter should be in no rush to revisit this misguided bill, even if he has time on his hands now that Miers has pulled out.

The measure would curtail sharply federal courts' ability to review habeas-corpus claims by convicts. In murder cases, that could mean a death-row inmate doesn't get a fair shot at proving innocence - despite the life-and-death stakes and recent examples of wrongful convictions.

Dozens of convicted murderers across the country have been exonerated by new evidence recently. In many cases, their fight to overturn their conviction dragged on for years. After he was jailed in 1981 in the rape-murder of a Delaware County woman, Nicholas Yarris spent 22 years under a death sentence before being exonerated by DNA evidence two years ago.

Americans rightly disturbed by the flaws in the capital punishment system should be outraged at this effort: It would take precious time off the clock for a wrongly convicted person whose life or freedom hangs in the balance.

It's bizarre, too, to recall that Congress only last year passed the Innocence Protection Act. That legislation established a multimillion-dollar fund to improve representation for capital defendants. The "streamlined" measure is treacherous backsliding, disguised by a cynically misleading title.

The bill is opposed by the states' chief justices, as well as the administrators who run state courts. You might expect these folks to welcome less second-guessing by the federal courts. Instead, state court officials say there's no evidence of unusual delays in litigating inmates' claims.

Congress already imposed strict limits on habeas appeals after the Oklahoma City bombing, responding to victims' advocates pleas for quicker "closure" in criminal cases.

Specter's amendments to the habeas bill don't make a bad bill more palatable. There's simply no appeal to the Streamlined Procedures Act.

It should be dropped.

**St. Louis Post Dispatch**
EDITORIAL
July 13, 2005

## DEATH PENALTY: Dead man talking

Larry Griffin went to his execution in 1995 protesting his innocence in the drug-related murder of Quintin Moss in 1980.

Now, new evidence suggests that Griffin was telling the truth and that Missouri executed an innocent man by lethal injection a decade ago. If that is true, Griffin's case could have a profound effect on the state's - and the nation's - legal machinery of death.

Year after year, condemned murderers on death row have been freed after new evidence surfaced that they had been wrongfully convicted. Since 1973, 119 prisoners facing execution have walked out of prisons in 25 states based on new evidence of innocence, according to the Death Penalty Information Center, a group that collects data on capital punishment, which it opposes. In Illinois alone, 18 men were found to be wrongfully convicted.

And yet proponents of the death penalty here and elsewhere, including two past Missouri governors and the current attorney general, continue to argue that no innocent person ever has been executed. It will be hard to make that argument now.

The case against Griffin was flimsy from the start. The state's star witness, Robert Fitzgerald, was a felon from Boston who was in the federal government's witness protection program. In fact, he faced criminal charges in St. Louis County. Fitzgerald was released from jail the same day Griffin was convicted.

Now, as the *Post-Dispatch*'s Terry Ganey disclosed this week, a new investigation by the NAACP Legal Defense Fund has found more reasons to question Fitzgerald's testimony. A police officer, a shooting victim and a relative of the murder victim say they did not see Fitzgerald at the scene.

St. Louis Circuit Attorney Jennifer Joyce, to her credit, has taken the unprecedented step of reopening the case of a dead man. She took that bold step - one that is sure to invite criticism - at the urging of Rep. William Lacy Clay, D-St. Louis, and after seeing the new evidence. Ms. Joyce, supported by Mr. Moss's relatives, wants to make sure that the real killer or killers are identified.

By chance, the evidence of Griffin's possible innocence comes as Congress is considering a bill that would streamline federal appeals, making it harder for death row inmates to prove their innocence.

Today, the Senate Judiciary Committee takes up S 1080, sponsored by Sen. Jon Kyl, R-Ariz., which would greatly restrict the use of the writ of *habeas corpus*. The "Great Writ," with roots as deep as the Magna Carta, is the legal tool prisoners use to challenge their convictions after other appeals have failed. The bill would cut off most of those appeals, except where a prisoner could make a compelling argument for his innocence.

On the surface, that sounds reasonable enough; only innocent people should be cleared. But in reality, cases of innocence seldom emerge full-blown. Prisoners get new trials built not upon oak-solid evidence of innocence, but upon the thin reeds of technicalities artfully woven together: A defense lawyer made an ineffective argument; a prosecutor failed to turn over key evidence. The Kyl bill would cut off *habeas corpus* for those intermediate appeals, making it nearly impossible to construct a case of innocence.

Seven people exonerated after serving years on death row are expected to attend today's hearing to drive home the point that the Kyl bill could have sent them to the death chamber. Larry Griffin cannot attend, but senators should heed his story and kill the bill.

Griffin is not the only person with a strong case of innocence who has been executed. His is just the strongest case among many. The machinery of capital punishment is so fundamentally flawed that it violates our standard of decency.

**St. Petersburg Times**
(St. Petersburg, FL)
EDITORIAL
August 26, 2005

## Unfair trial? Too bad
## The Streamlined Procedures Act seeks to keep the federal courts from examining the fairness of state trials - a move even state jurists oppose

With more than 40 death row inmates in the last six years having been found innocent and released from prison, you would think Congress would focus any new legislation on strengthening access to the courts so prisoners are not wrongly put to death. But you would be wrong. When Congress returns from its summer recess, it is expected to consider a bill designed to close the federal courthouse doors to prisoner appeals and speed death row inmates to their final end.

The misnamed Streamlined Procedures Act is about gutting procedures, not streamlining them. Two versions of the measure would go a long way toward eliminating federal habeas corpus review of state convictions. Prisoners use habeas corpus to claim that their trial or sentence was constitutionally faulty or that there is new evidence of actual innocence.

Those pushing the changes say the federal courts unduly inject themselves into death penalty cases where the state procedures have been fully and fairly followed. In fact, the federal courts have been a vital check on state trials. When state appeals courts disregard trial errors, such as incompetent defense lawyers, prosecutors who have engaged in misconduct or juries that have been racially rigged, the federal courts have been there to redress the wrong. Allowing an unfair process to stand can have life and death consequences for someone wrongly accused.

The two bills - the House version is only slightly more draconian than Senate's - would create virtually insurmountable procedural hurdles to all federal habeas review, whether the case involves a death row inmate or not. If an inmate has a legitimate claim but his attorney made some procedural error, the federal courts would be essentially barred from hearing it. While there is an innocence exception, it is so narrowly drawn that many of the innocent people who have recently left death row would not have been able to meet the proposed standard.

The bills contain a host of other barriers to keep the federal courts from examining the fairness of state trials. The measures reek of hostility toward the federal judiciary and the constitutional rights they uphold.

Some of the most vocal opposition to the measures is coming from conservative legal circles. The president of the Rutherford Institute, for example, told the Senate Judiciary Committee that the proposal "would likely result in the execution of citizens who have been wrongly convicted." More than 50 former prosecutors have declared their opposition.

A resolution raising serious objections to the measure and calling for additional study recently passed the Conference of Chief Justices by an overwhelming vote. These are the very state jurists whose relative autonomy and power would be increased by cutting off federal court review. They don't want this congressional favor. Congress should listen.

**St. Petersburg Times**
(St. Petersburg, FL)
EDITORIAL
October 31, 2005

# A threat to due process

## Leading judicial groups oppose the Streamlined Procedures Act of 2005 for good reason - it would severely diminish the vital writ of habeas corpus.

The Senate Judiciary Committee is expected to vote this week on legislation that would essentially strip the federal courts of their ability to police the fairness of state trials. This assault on due process should be stopped in its tracks.

Supporters of the Streamlined Procedures Act of 2005 say that changes are needed to move along executions and make the court system more efficient. But the two versions of this bill, one in the House and one in the Senate, reek of hostility toward the federal judiciary. The measures primarily would sharply reduce federal habeas corpus review and close the courthouse door to defendants, whether they are on death row or not, who claim their constitutional rights were violated in the course of a state conviction.

The act would expedite executions, but it also would make it nearly impossible for people whose convictions resulted from incompetent counsel, fabricated evidence or a racially stacked jury from seeking redress in the federal courts. It would make claims of actual innocence extremely hard to bring, increasing the risk of error and speeding along the execution of those who didn't do it.

According to the Death Penalty Information Center, more than 100 death row inmates have been exonerated as innocent of their crimes since the mid 1970s. One thing that many innocent convicts have in common is that their trials were often rife with constitutional errors.

But rather than focusing on fixing the state systems that allow slipshod justice to pass as fair process, these measures would "solve" the problem by forcing the federal courts to turn a blind eye. The writ of habeas corpus, a protection so vital to liberty that the founders put the right in the Constitution, would be diminished to a empty husk.

The Senate version is only slightly less draconian than the one offered in the House. Both versions have been objected to by leading judicial and legal organizations. The American Bar Association said in a recent letter that the bills "inadequately protects the innocent," and the Judicial Conference of the United States, an organization of federal judges, said there was no reason to tinker with existing law.

It is inexplicable why Sen. Arlen Specter, R-Pa., chairman of the Senate Judiciary Committee, would put his imprimatur on the Senate version of the bill. He usually has an accurate compass on civil liberties matters. But in this case he's dead wrong. These measures are highly destructive to this nation's traditional due process guarantees. They would replace accuracy with speed, and justice with notches on a belt. A bad trade all around.

**San Francisco Chronicle**
EDITORIAL
July 14, 2005

## Justice delayed and denied

THE WELL-DOCUMENTED margin of error in our judicial system -- especially the effects of racial bias and the inadequacy of legal representation for the poor -- is a good reason to rethink the death penalty. The exoneration of several men on Illinois' Death Row led Republican Gov. George Ryan to impose a moratorium on executions in 2000. A group of Assembly Democrats is planning to propose a similar pause on capital punishment in California.

Incredibly, the Senate Judiciary Committee may vote as early as today on a measure that would accelerate the pace of executions in this country by severely restricting the ability of condemned inmates to appeal their sentences.

The Streamlined Procedures Act of 2005, sponsored by Sen. John Kyl, R-Ariz., and Rep. Dan Lungren, R-Gold River (Sacramento County), is designed to curtail what they allege is an abuse of habeas-corpus appeals that allows capital cases to drag on for too many years. Their legislation would prevent federal review of cases from states that the U.S. Department of Justice has certified as having competent defense counsel. Inmates in those states would have to show evidence of their innocence -- not just flaws in the fairness or thoroughness of the proceedings against them -- to get a federal hearing.

One of the problems with this attempt to fast-track justice is that many of the recent exonerations resulted from evidence that came to light as a result of appeals based on trial errors -- such as incompetent lawyering, jury bias, destruction of evidence or prosecutorial misconduct.

Various concerns with Kyl's S1088 emerged at a Senate Judiciary Committee hearing Wednesday. One of the senators asking sharp questions was Dianne Feinstein of California, potentially a key vote.

If anything, the nation should be working to expose and reduce the margin of error in our judicial system -- especially in cases of life and death.

The Judiciary Committee should reject S1088. It's not the American way.

**San Jose Mercury News**
(San Jose, CA)
EDITORIAL
August 19, 2005

# Rush to Execution Leaves Justice in the Dust

## Congress Should Drop Proposal to Limit Appeals in Federal Courts

In the last six years, 44 inmates on death row have been freed because new evidence or further review of their cases showed them to be innocent.

Those cases provide proof, beyond a reasonable doubt, of the need to keep courthouses open to appeals from prisoners facing execution.

Except in Congress -- where reason seems not to reach. When the House and Senate return from their summer recess, they will have before them a bill that addresses the problem this way: Let's get the execution over with quicker.

The Streamlined Procedures Act, introduced in both houses, would sharply limit the ability of inmates to get federal courts to review death sentences handed down in state courts, where most criminal trials are held.

What's notable about the bill is who opposes it. It's not just the usual opponents of the death penalty in general.

• Two weeks ago, the national Conference of Chief Justices passed a resolution against the bill, with only the chief justice of Texas not joining the opinion.

• Although the bill's sponsors contend it will not prevent genuine claims of innocence from being heard, a dozen former federal judges wrote to the Senate Judiciary Committee to say that ``the language of the exception is so narrow that it will cover virtually no one."

• Fifty former prosecutors have written to oppose the law. One of them is Bob Barr, a former member of Congress who drafted a law in 1996 that limited death row appeals. He wrote to the Judiciary Committee that the 1996 law is ``working well." He calls the new bill ``legislation that is being pressed without sufficient deliberation, and without any real evidence that it is needed."

California Chief Justice Ronald George believes the bill would overturn recent U.S. Supreme Court decisions that granted new hearings to inmates on death row.
In recent cases, the Supreme Court -- not exactly known for mollycoddling criminals -- has agreed with inmates' appeals that prosecutors had hid information from the defense and that blacks had been improperly excluded from the jury. Those appeals would have been blocked by the new law.

There's no denying that a long time -- often a decade or more -- can pass from the time a criminal is sentenced to when the death sentence is carried out. The cases in which prisoners are wrongly convicted prove that such delay is not a problem to be streamlined away, but a protection to be valued.

**The Tennessean**
(Nashville, TN)
EDITORIAL
July 22, 2005

## Bill derails system of justice

A bill inching forward in Congress amounts to an assault on this nation's commitment to justice.

The purported reasoning behind the "Streamlined Procedures Act on 2005" is to reduce the backlog of criminal cases in the federal courts. Sen. Jon Kyl, R-Ariz. the primary sponsor of the measure, explains that increase in habeas corpus reviews have strained federal court resources and denied victims of crime the closure they need. Habeas corpus review is the primary way that inmates sentenced to death or to long terms can get their cases before a federal judge. It is often used to challenge the competency of the legal representation given to a defendant who cannot afford to hire a private attorney.

But Kyl's bill would "streamline" the process by taking the decision-making power away from judges and giving it to the U.S. attorney general. The legislation would prohibit federal courts from reviewing state cases if the state had been certified by the Justice Department as having competent defense counsel. The only way an inmate in those states could get his case before a federal court is to show evidence of actual innocence -- not just flaws in the legal process.

The bill makes no sense. The quality of defense attorneys appointed to represent poor defendants often varies greatly across a state. Just because a state gets the Justice Department's seal of approval for having competent defense counsel doesn't assure that every defendant will be represented well. And how can an inmate who was wrongly convicted because he had a disinterested attorney find new evidence after the fact of the conviction?

The best way for Congress to assure that cases move quickly and carefully through the judicial system is to provide resources for competent counsel. This bill insults the separation of powers. It turns this nation's adversarial judicial process on its ear by giving the nation's chief prosecutor the final say on who gets judicial review. And it would mean a sure and certain death for innocent people, leaving the guilty free. Members of Congress should demonstrate their commitment to justice by killing this bill.

**Washington Post**
EDITORIAL
July 10, 2005

# Stop This Bill

CONGRESS HAS a novel response to the rash of prisoners over the past few years who have been exonerated of capital crimes after being tried and convicted: Keep similar cases out of court. Both chambers of the national legislature are quietly moving a particularly ugly piece of legislation designed to gut the legal means by which prisoners prove their innocence.

Habeas corpus is the age-old legal process by which federal courts review the legality of detentions. In the modern era, it has been the pivotal vehicle through which those on death row or serving long sentences in prison can challenge their state-court convictions. Congress in 1996 rolled back habeas review considerably; federal courts have similarly shown greater deference -- often too much deference -- to flawed state proceedings. But the so-called Streamlined Procedures Act of 2005 takes the evisceration of habeas review, particularly in capital cases, to a whole new level. It should not become law. For a great many capital cases, the bill would eliminate federal review entirely. Federal courts would be unable to review almost all capital convictions from states certified by the Justice Department as providing competent counsel to convicts to challenge their convictions under state procedures. Although the bill, versions of which differ slightly between the chambers, provides a purported exception for cases in which new evidence completely undermines a conviction, this is drawn so narrowly that it is likely to be useless -- even in identifying cases of actual innocence.

It gets worse. The bill, pushed by Rep. Daniel E. Lungren (R-Calif.) in the House and Jon Kyl (R-Ariz.) in the Senate, would impose onerous new procedural hurdles on inmates seeking federal review -- those, that is, whom it doesn't bar from court altogether. It would bar the courts from considering key issues raised by those cases and insulate most capital sentencing from federal scrutiny. It also would dictate arbitrary timetables for federal appeals courts to resolve habeas cases. This would be a dramatic change in federal law -- and entirely for the worse.

The legislation would be simply laughable, except that it has alarming momentum. A House subcommittee held a hearing recently, and the Senate Judiciary Committee is scheduled to hold one and then mark up the bill this week. Both Judiciary Committee chairmen surely know better. House Judiciary Chairman F. James Sensenbrenner Jr. (R-Wis.), after all, has fought for better funding and training for capital defense lawyers. And Senate Judiciary Chairman Arlen Specter (R-Pa.) has long opposed efforts to strip federal courts of jurisdiction over critical subjects. Neither has yet taken a public position on the bill. Each needs to take a careful look. It is no exaggeration to say that if this bill becomes law, it will consign innocent people to long-term incarceration or death.

**Washington Post**
EDITORIAL
August 19, 2005

# Hands Off Habeas

PROPONENTS OF the so-called Streamlined Procedures Act justify this radical piece of legislation by citing the supposedly intrusive scrutiny of federal courts of state capital convictions and the delays that ensue. So it is particularly instructive that chief justices of the nation's state court systems have voted overwhelmingly to urge Congress to slow down. The chief justices would be, after all, the apparent beneficiaries of the bill, which would gut federal review of the convictions they oversee. Yet in a strongly worded resolution by the Conference of Chief Justices -- with only the chief justice of death-happy Texas voting no -- the heads of state judicial systems said in essence, "Thanks, but no thanks." Cooler heads in Congress ought to listen.

The bill, pushed in the Senate by Jon Kyl (R-Ariz.) and in the House by Daniel E. Lungren (R-Calif.), would be an unmitigated disaster. Habeas corpus is the centuries-old device by which inmates challenge the legality of their detentions. In modern times it has become the essential vehicle by which convicts on death row or serving lengthy prison terms attack their state-court convictions. Many innocent people owe their freedom to their ability to file habeas petitions.

Yet in many death cases, the most drastic versions of the bill would eliminate federal review entirely. Even where they didn't do that, they would create onerous procedural roadblocks and prevent federal courts from considering key issues. They would bar federal courts from reviewing most capital sentencing and create arbitrary timetables for federal appeals courts to handle these cases. All of which, you might think, would be music to the ears of state court justices, for whom it is a big blank check.

Unless, of course, those chief justices are interested in, well, justice. The resolution, adopted jointly with the Conference of State Court Administrators, notes that "the changes contemplated in these measures may preclude state defendants in both capital and non-capital matters from seeking habeas corpus relief" with "unknown consequences for the state courts and for the administration of justice." It recommends "delaying further action" pending additional study to evaluate whether change in current law is even necessary. If it is, the justices urge Congress "to consider appropriate targeted measures that will ameliorate the documented problems and avoid depriving the federal courts of their traditional jurisdiction without more supporting evidence."

The Senate Judiciary Committee is poised to take up a somewhat less dire version of the bill when Congress returns. This rebuke ought to give senators pause about even that. At a minimum, any senator contemplating voting for it needs to ask why the Senate should be insulating state courts from review against their apparent will.

**The Washington Post**
EDITORIAL
September 29, 2005

# Kill Bill

TODAY, THE SENATE Judiciary Committee takes up the so-called Streamlined Procedures Act, a bill that radically scales back federal review of state convictions and death sentences. Calling what this bill does "streamlining" is a little like calling a scalping a haircut. A better name would have been the Eliminating Essential Legal Protections Act. What it does, in effect, is curtail the federal role in policing constitutional violations in state criminal justice systems using the venerable mechanism of habeas corpus. Judiciary Committee Chairman Arlen Specter (R-Pa.) has moderated some of the worst provisions, but this bill is beyond rehabilitation. If it passes, the chances that innocent people will be executed will go way up.

Even after Mr. Specter's efforts, the bill creates onerous procedural hurdles for convicts. It tries to speed up habeas corpus proceedings by making it easier for convicts to lose their right to appeal to federal courts. For example, if a convict fails to raise an argument in state court, federal courts will have no jurisdiction over the claim even if there was a good reason for the failure. If he filed a claim in federal court before going to state court, that claim would be thrown out and lost forever. Supposed exceptions for cases of actual innocence are so narrow as to be useless. And the bill would allow states to race petitions through the courts if they can convince the attorney general that they have an adequate system for providing lawyers in post-conviction proceedings.

Why the radical change? We see no reason. Nor does the Judicial Conference, the administrative arm of the federal judiciary. Like a national organization of state-court chief justices, which came out against the bill this summer, the Judicial Conference made clear that it "does not believe" in "the need for a comprehensive overhaul of federal habeas jurisprudence." Indeed, if anything, federal rules are too strict. Around the country, concerns about potentially irreversible miscarriages of justice have led state legislatures to take a hard look at their death penalty systems. Congress itself passed important legislation not too long ago to encourage states to improve the quality of lawyers they provide capital defendants. This bill would more than undo that progress.

**Statement of Seth P. Waxman**
November 16, 2005

I appreciate this second opportunity to address the Committee on this important topic. In my earlier statement and testimony, I attempted to point out the most significant problems with the original bill. That version of S. 1088 sought to remove jurisdiction from the federal courts to adjudicate broad categories of constitutional claims and was a fundamental break with the longstanding statutory and constitutional history of habeas corpus. It was my view that before enacting such sweeping changes to the writ, Congress should first collect sufficient information to make sure that this bill would fix what may be broken, and leave in place what is working properly. I have by no means changed that view, and I again encourage the Committee to contact the Federal Judicial Center and the Administrative Office of U.S. Courts to obtain the necessary data and analyses.

Since my July testimony, I have met with member staff to discuss different approaches and have reviewed the current substitute amendment. While I would certainly support revisions to habeas that meet the expressed goals of S. 1088—to speed the review process where (and if) it continues to lag, without sacrificing the writ's ability to remedy egregious constitutional error or wrongful convictions or sentences—I believe that the current amendment remains seriously flawed and should not become law. This latest substitute continues to preclude review of broad categories of claims, including all sentencing claims that come to federal court unexhausted, defaulted, or not discovered until the amendment period closes—even if the petitioner was not at fault, and even if the basis of the claim was deliberately and unlawfully withheld by a state official.

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It might aid the Committee to better understand my views if I can place the changes this amendment seeks to make within the context of the historic role of habeas corpus as well as recent changes in the law. I am familiar with this history. I represented citizens in habeas corpus proceedings prior to my years at the Department of Justice. I represented the government in these cases while at DOJ. I was personally involved in the Department review of and support of the AEDPA. Since leaving government service, I have represented habeas petitioners before the Supreme Court in several recent cases.

Habeas corpus is a critical safeguard against wrongful imprisonment. As Justice Holmes' classic statement in dissent in the Leo Frank case articulates:

> [H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although

> every form may have been preserved, opens the inquiry whether they have been more than an empty shell.[1]

Throughout the 20th century, the federal habeas corpus statute provided a federal forum to citizens who believed their convictions or sentences were brought about in violation of a Bill of Rights protection. Through habeas jurisdiction, the federal courts have stepped in and remedied egregious trespasses of these fundamental rights.[2]

During these years and up through the mid-1980's, the remedy was designed to focus upon whether federal constitutional error deprived the petitioner of a reliable verdict. Habeas courts were free to conduct evidentiary hearings in instances where they believed a more complete factual record would enhance the quality of their ruling;[3] they could hear defaulted claims unless the prisoner had withheld the claim from the state courts;[4] they were charged with determining, *de novo*, whether the facts showed a violation of the Constitution;[5] and they could entertain more than one petition from the same prisoner so long at the petitioner's conduct did not "abuse" the writ.[6]

Beginning in the mid-1980s, the Supreme Court thoroughly overhauled its writ jurisprudence and significantly tightened procedures to provide for much greater finality of state-court judgments. The Court took this action largely in response to assertions that the review of capital cases took too long and lacked finality.

*Procedural Default.* With regard to claims not properly raised before the state courts, the Court abandoned the *Fay* deliberate by-pass rule and installed the "cause" and "prejudice" standard.[7] This shifting of the burden of proof placed significant burdens upon the petitioner before a defaulted claim could be heard in federal habeas proceedings.[8] For a defaulted claim to receive merits review, the petitioner needed to

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[1] *Frank v. Magnum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

[2] *See, e.g., Moore v. Dempsey*, 261 U.S. 86 (1923) (due process violation where trial is dominated by mob and state corrective process is inadequate); *Rogers v. Richmond*, 365 U.S. 534 (1961) (coerced confessions "offend an underlying principle in the enforcement of our criminal law" and violate due process).

[3] *Townsend v. Sain,* 372 U.S. 293 (1963).

[4] *Fay v. Noia*, 372 U.S. 391 (1963).

[5] *Miller v. Fenton*, 474 U.S. 104 (1985).

[6] *Sanders v. United States,* 373 U.S. 1 (1963).

[7] *Wainwright v. Sykes*, 433 U.S. 72 (1977).

[8] *See Smith v. Murray*, 477 U.S. 527 (1986); *Coleman v. Thompson*, 501 U.S. 722 (1991).

establish "cause"—usually that his trial counsel's performance was so inadequate as to constitute a violation of the Sixth Amendment right to counsel, or that state officials interfered with the timely assertion of the claim. To show "prejudice," the petitioner had to demonstrate that the error substantially affected the verdict. It is widely agreed that this standard is demanding and difficult to meet.

This "cause and prejudice" standard is now well understood, and in practice it bars a large number of claims defaulted in state court from merits review in habeas proceedings. Most government attorneys are satisfied that this doctrine strikes the proper balance between respecting valid state procedural rules and vindicating harmful constitutional error.[9] Many defense attorneys contend that the standards overprotect finality and unfairly bar review of extremely meritorious claims. Many prisoners, including those on death row, have in fact permanently lost federal review of potentially meritorious constitutional claims due to procedural bars.

*Exhaustion.* With regard to the exhaustion requirement, the Court disapproved the consideration of so-called "mixed" petitions—those that contain both exhausted and unexhausted claims. It established a firm rule that petitions containing both exhausted and unexhausted claims must be dismissed.[10] This rule strengthened the core reason for the exhaustion doctrine—that state courts be given the first opportunity to adjudicate federal claims asserted by state prisoners.

*State-Court Factfinding.* Further, the Court significantly reduced the availability of evidentiary hearings in federal habeas proceedings. It abandoned the *Townsend* rule and held that if the prisoner had a fair opportunity to develop the facts in state court, no hearing could be held in federal court unless he could show "cause" and "prejudice."[11] Again, most government attorneys believe this standard properly balances the competing interests, while defense counsel believe it is unduly harsh—particularly when applied against indigent petitioners who had no lawyer or plainly deficient legal assistance in the state court.

*Retroactivity.* Also in the 1980s, the Court significantly changed the rules concerning what constitutional case law would be available to habeas petitioners challenging their convictions and sentences.[12] The Court reversed the previously-existing rule that most of its decisions would apply in habeas proceedings and held instead that

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[9] Due to the settled nature of the cause and prejudice standard, and general satisfaction among government counsel with the consequences of the doctrine, AEDPA included no provision to address defaulted claims.

[10] *Rose v. Lundy*, 455 U.S. 509 (1982)

[11] *Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992)

[12] *Teague v. Lane*, 489 U.S. 288 (1989)

nearly all rulings beneficial to prisoners that are announced after a petitioner's conviction becomes final will not be available to him in habeas proceedings. By contrast, new decisions that favor the State do apply in habeas proceedings. Needless to say, this change was widely welcomed by government attorneys and criticized by the defense bar.

*Harmless Error.* The Court also decided that the traditional harmless-error rule—which provides that once constitutional error is shown, the State has the burden to show it was not harmful beyond a reasonable doubt—would no longer apply in habeas proceedings.[13] It held that relief would issue only if the habeas court determined that the error substantially influenced the jury verdict.[14]

*Successive Petitions.* Further, the Court abandoned the approach that generally permitted the filing of a second or successor petition and ruled that no claim, regardless of its merits, could be reviewed in a second or successor petition unless the petitioner could show both "cause" and "prejudice," or a reasonable likelihood of innocence.[15] And for successor petitions attacking a capital sentence, the Court ruled that only petitioners who could show, by clear and convincing evidence, that they were not eligible for the death penalty would be heard in such proceedings.[16]

Collectively, these decisions transformed the writ. They left prisoners with essentially one shot at federal review. And prisoners faced substantial (but not insurmountable) burdens to secure merits review of claims or evidence not properly presented to the state courts. Relief was available only if the error played a significant role in the judgment. This was the body of law upon which the AEDPA amendments built.

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AEDPA sought to continue this reform, focusing upon four areas. First, it sought to accelerate the habeas process. Second, it strove to bring greater finality by limiting prisoners to a single petition. Third, it fortified the deference given to state-court factual and legal determinations. And finally, it sought to provide incentives to States to furnish competent, funded counsel in post-conviction proceedings by rewarding those that did with even tighter restrictions on federal review.

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[13] *Chapman v. California*, 386 U.S. 18 (1967).

[14] *Brecht v. Abrahamson*, 307 U. S. 619 (1993).

[15] *McCleskey v. Zant*, 499 U.S. 467 (1991)

[16] *Sawyer v. Whitley*, 505 U.S. 333 (1992)

*Acceleration.* Two AEDPA provisions sought to accelerate the review process. First, for all petitions, AEDPA erected a one-year statute of limitations. No Congress had previously imposed any such limitations rule upon habeas. And for capital cases, AEDPA contained a separate chapter—commonly known as the opt-in amendment—that provided that for States that voluntarily undertook to implement a credible system for appointing qualified counsel during post-conviction proceedings, the statute of limitations period would be reduced to six months, and the federal courts would have to complete review within designated time periods.

It is clear that the general statute of limitations has succeeded in accelerating the filing of federal petitions. It has also barred numerous prisoners, who failed to comply with this provision, from *any* federal review of the lawfulness of their incarceration. Courts have found cause to toll the limitations period only upon an extreme showing of extenuating circumstances. Death-row inmates whose lawyers missed the statute of limitations have been executed without any federal review of their convictions or sentences.[17]

There is an insufficient record upon which to determine if the opt-in chapter can and will speed up the review of capital petitions. As I will explain in a moment, only a single State (Arizona) has opted-in, after initial, ill-prepared attempts to qualify failed nearly a decade ago. There is no reason to believe that the provision will not work as designed for States that do chose to qualify.

*Finality.* By limiting the cognizable claims in successor petitions to two narrow categories—those that rely upon new retroactive rules announced by the Supreme Court, and those supported by clear and convincing evidence of innocence—such petitions are brought far less often, and they succeed in only rare circumstances. AEDPA has all but ended second or successor petitions, allowing them only to vindicate fundamental fairness.

*Deference.* AEPDA installed significant deference rules with respect to both the state court's findings of fact and its conclusions of law. With regard to the former, it abandoned an earlier requirement that the state-court factfinding process be adequate, and declared that *any* fact finding is presumed correct and cannot be set aside unless it is shown to be erroneous by clear and convincing evidence. The statute now also prohibits

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[17] *See, e.g., Ex Parte Rojas*, 2003 WL 1825617 (Tex. Crim. App. Feb. 12, 2003) (Price, J., dissenting to the denial of the Motion to Protect Applicant's Federal Habeas Review, joined by Johnson and Holcomb, JJ.,) (no equitable tolling of one-year limitations period for filing federal habeas petition where lawyer serving third probated suspension for failure to competently represent clients did not take any action to preserve petitioner's federal habeas review and failed to notify petitioner state court denied relief); *Lookingbill v. Cockrell*, 293 F.3d 256 (5th Cir. 2002); *Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000); *Cantzu-Tzin v. Johnson*, 162 F.3d 295 (5th Cir. 1998).

federal courts from holding evidentiary hearings unless the petitioner can show (1) that he was prevented from developing the facts in state court, or (2) that, despite diligent efforts, (a) the facts were not available, and (b) by clear and convincing evidence, he is innocent. These provisions sharply constrain federal habeas courts, and allow factual development only in compelling circumstances.

With regard to state-court legal determinations, for the first time in history the amendments removed the traditional power of federal courts to review a legal determination *de novo*. They imposed the rule that no legal determination—even if incorrect—could be disturbed unless it was contrary to a directly controlling Supreme Court decision or amounted to an unreasonable application of such authority.

That innovation marked a landmark shift in habeas jurisprudence, and Supreme Court construction of this provision has made clear that state-court legal determinations cannot be disturbed even when they are clearly wrong. They may be disturbed only when they are *unreasonably* wrong.[18]

With respect to the opt-in amendments, perhaps to the surprise of AEDPA sponsors, few States have elected to enhance their post-conviction review process sufficiently to formally opt-in to the expedited procedures available in the Chapter 154 amendments. Many never attempted to do so and provide no counsel services;[19] others made early half-hearted attempts with inadequate systems and never again sought certification.[20] One State, Arizona, has met the standards.[21]

Thus, AEDPA enacted sweeping changes designed to further protect state finality interests and speed up the review process. As a result of those changes, which augmented the Supreme Court's earlier comprehensive pruning of habeas, the remedy that exists today is vastly scaled back. It reaches only a subset of the cases in which egregious harmful constitutional error deprived the petitioner of a minimally fair trial.

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[18] *Williams v. Taylor*, 529 U.S. 420 (2000).

[19] Georgia, for example, makes no provision for the provision of appointed counsel in the state post-conviction process.

[20] *See, e.g., Leavitt v. Arave*, 927 F. Supp. 394 (D. Idaho 1996) (Idaho); *Williams v. Cain*, 942 F. Supp. 1088 (W.D. La. 1996) (Louisiana); *Sexton v. French*, 163 F.3d 874, 876 n.1 (4th Cir. 1998) (North Carolina).

[21] Arizona did not receive expedited review in the case that *provided* certification because the petitioner in that case had not received the benefits of the enhanced counsel system. *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2001).

It is this Writ that the current S. 1088 seeks again significantly to shrink. In its initial version, that bill sought to strip away jurisdiction to review broad categories of constitutional claims. Respected voices from many points of view urged Members to reject this bill.

For the most part, the present amendment rejects that misguided approach. Yet, upon careful review, it achieves many of the very same results. For the reasons that follow, I believe the substitute should not become law.

*Exhaustion.* I begin with the proposed changes to the exhaustion rule in Section 2. Since its inception in the late 1880s, the exhaustion doctrine has operated as a *sequencing* rule. It instructed petitioners that they could not bring their federal claims to federal court without first presenting them before the state courts. When an unexhausted claim is presented in a federal habeas petition today, the claim must be dismissed for failure to exhaust state remedies. If state law no longer leaves remedies to exhaust, in most instances the claim is treated as defaulted and cannot receive merits consideration unless the petitioner meets the demanding "cause" and "prejudice" standard.

Section 2 of S. 1088 would fundamentally change the principle of exhaustion. When unexhausted claims are presented, this amendment directs not that the State be given the opportunity to adjudicate them; rather, it irrebuttably *assumes* that the state court would not entertain them—even if state remedies in fact remain open. The claim remains before the federal court and must be dismissed with prejudice unless the petitioner satisfies a standard never before required in this context—and one that would rarely if ever be satisfied. The petitioner must show not only "cause" for his failure to adequately exhaust, but also, unlike the familiar "prejudice" standard used in other contexts, he must also demonstrate that he is "innocent." What is more, he must not only show *legal* innocence of the crime of which he was convicted, which is a highly demanding standard, but he must also establish *complete* innocence—that he had no involvement whatsoever in the underlying crime.

The effect of this standard is certain. It would bar review of all previously-unexhausted sentencing claims, regardless of how egregious the violation, and practically all guilt-phase claims. I have seen no evidence whatsoever requiring such a draconian solution. This provision would prohibit a federal court from reviewing any claim that the petitioner was prevented from asserting before the state courts because of government interference, or the incompetence of his counsel, or even because he had no attorney, unless he establishes his complete innocence. Congress should not create such a broad rule that would preclude review of even egregious prosecutorial misconduct that evades detection in state court. That is what this provision accomplishes.

If the concern is that petitioners will attempt to exploit the total exhaustion rule by deliberately inserting unexhausted claims so the federal petition will stall, the Supreme

Court has recently addressed that very issue and solved the problem. In *Rhines v. Weber*, 125 S. Ct. 1528 (2005), the Court fashioned a sensible rule that, for good cause, empowers the district court to hold the petition for a short time to permit exhaustion if the claim is likely meritorious. If the petitioner does not promptly return to state court to exhaust, the federal court is to proceed with the exhausted claims only.

Finally, in this section and in others as well, the habeas courts are directed to consider legal claims that were *not* adjudicated on their merits in state court as if they *were*. The bill does so by requiring that if the court reviews the merits of an unexhausted or defaulted claim that did not receive merits review in the state court, it must apply section 2254(d). That provision charges the federal courts not to disturb a state-court ruling unless it is contrary to, or is an unreasonable application of, clearly established Supreme Court law. But in the case of an unexhausted or defaulted claim, there is *no* state-court determination to which a federal court may defer. In such circumstances presently, the courts conduct *de novo* review—mindful that under *Teague v. Lane* they may rely only upon controlling law that existed at the time the conviction became final.

*Amendment.* The purpose of Section 3 of S. 1088 remains unclear to me, though I have continued concerns about its potential effects. As now drafted, that section would limit amendments to habeas petitions to those filed either before the statute of limitations runs or the State answers, whichever comes first. I would imagine that the purpose behind this provision is to ensure that petitioners do not constantly amend their pleadings, thus dragging out the process, running afoul of the statute of limitations, and burdening prosecutorial resources.

But it seems to me that the Supreme Court more than adequately addressed such concerns just last term in *Mayle v. Felix,* 125 S. Ct. 2562 (2005), ruling that only those amendments that "relate back" to the claims *already* included in a timely petition will be allowed. The S. 1088 provisions that go beyond *Mayle* threaten to do far more harm than good; indeed, I cannot see what genuinely useful purpose they would serve. For one thing, the State could cut off the petitioner's ability to present timely, meritorious claims simply by answering quickly. And if a petitioner gains access to exculpatory evidence through discovery in federal court that was denied him in state court—as happened recently in *Banks v. Dretke*, 540 U.S. 668 (2004)—and a claim of concealed *Brady* evidence arises, how is he to be able to present it? The ability to amend is already seriously restricted: it is not clear how this provision would advance a sensible goal while protecting a prisoner's right to present meritorious claims in a circumscribed manner.

*Procedural Default.* I am disappointed to say that this provision, one of the most troubling in the bill, is little changed in effect from earlier versions. Section 4 of S. 1088 would still strip federal *jurisdiction* over any claim that had been found by a state court to have been procedurally barred. This means that a default that was imposed despite the

petitioner's essential compliance, as in *Lee v. Kemna*, 534 U.S. 362 (2002), or a bar that was announced *after* the prisoner allegedly failed to comply with it, as in *Ford v. Georgia*, 498 U.S. 411 (1991)—or even a default that was caused by the State's own misconduct, like *Amadeo v. Zant*, 486 U.S. 214 (1988), where the prosecutor rigged the jury pools to underrepresent women and African-Americans and covered his tracks—would be insulated from federal review.

I cannot understand why such a result would be desired. Federal law is already highly deferential to States' assertions of procedural irregularities. If a state court finds that a prisoner did not follow an established, legitimate procedural rule, and there is no excuse beyond his control for that failure, there already is no federal review—period. The Supreme Court made that clear in *Coleman v. Thompson*, 501 U.S. 722 (1991), where the inmate's postconviction counsel filed his brief a few days late. That one negligent act deprived Mr. Coleman of all federal habeas review because the state rule was well established and there was no way around it. Mr. Coleman was executed without any recourse to habeas corpus due to that default.

But this amendment, as I noted in my earlier testimony, would insulate *any* invocation of default from any federal review. I spoke in July about *Banks v. Dretke*, where the petitioner failed to allege that state prosecutors had coached their key guilt-phase witness about what to say, because the State successfully resisted discovery and by the time Banks learned of the misconduct, it was too late to raise the claim in state court. The Supreme Court held that it could not reward the prosecution from hiding this impeachment evidence so assiduously. Instead, applying a stringent "cause" and "prejudice" doctrine, it excused Mr. Banks from not having raised the claim at the point at which the State was continuing to conceal the truth and found that that concealment might very well have affected the verdict. Had S. 1088 then been in effect, the prosecutors would have benefited from their concealment and the State would have executed Mr. Banks on the basis of false evidence.

Amended S. 1088 would allow a claim such as this to be heard only if the petitioner not only could prove cause (as Mr. Banks was indeed able to do), but also his complete *innocence*. This is the same standard used to excuse the failure to exhaust or amend under this bill, and I would like to address it here.

Cause and prejudice—the current standard for obtaining merits review in the face of a legitimate procedural bar—is rarely satisfied. As to the prejudice requirement, the reviewing court must ask if it can truly have confidence in a verdict obtained without the missing evidence. Thus in *Strickler v. Greene,* 527 U.S. 263 (1999)—where the State insisted that it had provided all exculpatory evidence yet did not acknowledge that its star eyewitness had given several statements contradicting her trial testimony—the Supreme Court found cause in the State's suppression, but not prejudice, because it could not say that the suppressed evidence would have made a difference in the outcome of Strickler's

trial or sentencing. The case powerfully reinforces the reality that just because a petitioner can prove he was entirely free from fault for having failed to obtain the facts establishing a constitutional violation does *not* mean that he obtains relief on his claim; he must also satisfy the extremely demanding "prejudice" prong.

I do not understand why it is necessary to make that already-strict and rarely-met standard essentially unattainable. Requiring a showing of complete innocence on top of "cause" will do just that. Many prisoners come to federal court without ever having had adequate tools to prove their claims, much less their innocence. It is often only after discovery is granted, or a procedurally defaulted claim is heard, that evidence of innocence emerges. The Supreme Court found in *Kyles v. Whitley,* 514 U.S. 419 (1995), for example, that the State of Louisiana violated the Constitution when it withheld *Brady* evidence about its main witness. After the Court granted relief, and evidence emerged pointing to that witness as the killer, the State was unable to obtain a verdict of guilt (much less a death sentence) in three subsequent trials, and Kyles was freed. Ronald Williamson from Oklahoma won a new trial in federal court on an improperly defaulted competency claim and was later exonerated by DNA evidence. You may remember the notorious case of Anthony Porter in Illinois, who received a stay of execution on a mental-retardation claim just days prior to his scheduled execution. While that stay was in effect, a group of students investigated and identified the real killer. Porter, still alive, was released. Evidence of innocence is very often not immediately available. Nor is it always tied to the constitutional error that leads to the new trial, which is an additional requirement that amended S. 1088 would impose.

The "Great Writ" has never before been treated as a tool for divining who is innocent. Yet the "exceptions" to most of the new provisions in this bill are premised on just that: complete innocence and the ability to prove it. Thus an inmate whose incompetent state lawyer did not press the claim that he was not even eligible for the death penalty would not be able to turn to federal court because, under this legislation, defaulted sentencing claims could never be reviewed, even if they were barred improperly. The writ would be unavailable to Ledell Lee, whose Arkansas lawyer was drunk during postconviction proceedings.[22] Or to Zachary Wilson, whose trial prosecutor instructed other district attorneys on how, when, and why to strike African-American jurors, and did so in his case.[23] Prohibiting federal courts from entertaining these cases would be a terrible sea change in the way the writ of habeas corpus has been understood in our country.

There are still other significant problems with this section. Contrary to notions of federalism, the bill would require federal courts to default some claims that state courts

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[22] *Lee* v. *Norris*, 354 F.3d 846, 848 (8th Cir. 2004) (post-conviction lawyer "impaired to the point of unavailability" in state habeas hearing).

[23] *Wilson* v. *Beard*, 2005 WL 2559716 (3d Cir., Oct. 13, 2005).

*did* address on the merits, and to comb the state record where their rulings were ambiguous. And it offers an illusory exception: where the Supreme Court has *already* held that a state procedural rule is infirm, jurisdiction is permitted—thus allowing review only for those Missouri petitioners situated exactly like Mr. Lee or those in Georgia facing the precise default addressed in the *Ford* case.

*Tolling.* Section 5 of amended S. 1088 fortunately ameliorates some of its predecessor's problems in the tolling section. Statutory tolling would occur by petition and not by claim, and in most jurisdictions all of the time spent pursuing state-court remedies would be tolled against the federal statute.

Yet the amendment remains problematic. For one thing, the time spent preparing appeals and the like in state postconviction proceedings still will not be tolled in "original writ" jurisdictions. Presumably the drafters are taking aim at systems like California's, where an original writ can be filed at each stage of the proceedings, and time limitations may not be clearly delineated. But as the provision does not specify what is meant by "original writ," I continue to have concern that some petitioners could unwittingly run afoul of the federal statute of limitations simply by *properly* pursing their state-court remedies—a result that would go against the very notions of federalism this bill presumably is meant to advance.

Similarly, the statute is tolled for state-court proceedings only when they assert a *federal* constitutional claim. Here as elsewhere, the proposed amendments may serve to reward or even encourage bad behavior on the part of law enforcement. If a state petitioner does not assert a claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), or *Napue v. Illinois,* 360 U.S. 264 (1959), or *Giglio v. United States,* 405 U.S. 150 (1972), because such information was not made available to him, and then in federal court through discovery or even happenstance he learns that the State withheld exculpatory information in violation of the Fifth, Sixth, Eighth or Fourteenth Amendments, he would not be able to assert such a claim because he will already have missed the federal statute of limitations although he diligently pursued the claims available to him in the state forum. Prisoners should not be encouraged to advance claims without the facts to support them.

Again, it is unclear what this provision hopes to accomplish. Certainly petitioners should be exhorted to raise each and every claim the facts support; indeed, current law penalizes them severely for not doing so. And the exhaustion doctrine as it now stands restricts a prisoner's ability to raise any new claims in a federal forum. This new provision cuts off federal review for the most deserving of petitioners without any real gain on the other side of the scale.

As has previously been pointed out, S. 1088 would eliminate any authority whatsoever for the courts to grant equitable tolling. Again, it is not clear why such a

draconian result—one not found in other areas of the law where limitations periods are imposed, is necessary here. A look at the very few cases in which equitable tolling has been permitted demonstrates that it is not in any way being abused.

*Capital Cases.* As I noted earlier, AEDPA established an expedited review process to reward States that established systems to provide competent defense services during their post-conviction process. Only one State has opted in. It would be interesting to gather information about why most have elected not to do so, but I believe it is simply the fact that the goals of the AEDPA have otherwise been satisfied: habeas cases are moving through the federal-court system adequately, and fewer prisoners are prevailing.

Under the circumstances, the most sensible course is to leave the Chapter 154 amendments alone. If more States establish systems to provide competent counsel in their post-conviction proceedings but are thwarted from receiving opt-in certification, it would then be appropriate to reopen this issue. But not today. Indeed, I find the latest amendment troubling—particularly removing judicial review of the qualification decision and placing it into the hands of the Attorney General. That determination is one that should be made by an impartial adjudicator, not a prosecutor. Whoever may occupy the position of the Attorney General of the United States, the position is not one of adjudication. We operate under an adversarial system of criminal justice in this country, and the Attorney General is by definition a prosecutor. The Justice Department often joins the States as an *amicus curiae* in state habeas cases before the Supreme Court, but I cannot recall any instance in which the Department did so on behalf of a prisoner. In the complete absence of any demonstration that the current Chapter 154 system does not work—and does not work because Article III judges cannot adequately perform the adjudicative function—I think it would be most unwise to transfer that function to the Attorney General.

*Other Provisions.* S. 1088 seeks also to make unwise changes to procedures that indigent petitioners must follow to secure necessary investigative and expert witness funds. Under current law, such requests are reviewed by the judge hearing the habeas case, and the proceeding is appropriately *ex parte*, as an application demonstrating substantial need is required, and that application inevitably (or at least usually) contains privileged information about trial preparation.[24] The proposed amendment would condition application for such resources upon providing a copy of the application to the State—requiring an indigent petitioner to choose between securing the funds his counsel believes are necessary and foregoing such funds in order to preserve the confidentiality our adversary system requires. Especially since I am unaware of any evidence that the present system is not working properly, I cannot support this proposal.

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[24] A non-indigent petition need not share any decisions to secure experts or investigators with the State or court. Nor does the State share such information with the petitioner and court.

Second, the amendment requires that any funds authorized must be disclosed to the public immediately. I perceive no need for such disclosure, which in practice could deter a judge from granting necessary funds. If there were merit to this proposal, the amendment should require disclosure of public funds authorized and spent by both sides.

Given the importance of this legislation, I welcome the opportunity to continue to work with Committee members and their staff to ensure that any changes to the habeas statute work to enhance the quality of review.

Thank you.